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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 11

GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, ET AL., APPELLANTS,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

FILED NOVEMBER 17, 1959
PROBABLE JURISDICTION NOTED APRIL 25, 1960

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

vs.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS.

Attorneys

For Plaintiff: Goulston & Storrs, 50 Federal St., Boston, LI 2-9649.

For Defendant: Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, 36 Court St., Springfield.

Joseph H. Elcock, Jr., Asst. Atty. General for Comm. of Mass., State House—Boston, CA 7-4600 Ext. 252.

Plaintiff's Account		*Received*	*Disbursed*
1958			
May 1	From Herbert B. Ehrmann	15.00	
2	To General Fund		15.00

Malcolm V. McCabe—80 Federal St.—Boston 10, for Mass. Retail Grocers and Provision Dealers Assn.

Henry M. Leen—31 Milk St.—Boston, for Archdiocesan Council of Catholic Men.

Herbert S. Avery—212 Water St., Boston 9, for Lord's Day League of New England.

Leo Pfeffer—15 E. 84th St.—New York 28, for International Religious Liberty Association.

Howard S. Whiteside—30 State St.—Boston, for Southern New England Conference of Seventh Day Adventists.

[fol. 2] 58-471-M

DOCKET ENTRIES

Date 1958		*Filings—Proceedings*	*Amount Reported in Emolument Returns*
May	2	Complaint filed.	15—
	2	McCarthy, J. Request for appointment of additional judges, filed and allowed.	
	5	Summons issued.	
	6	Motion for preliminary injunction, filed.	
	8	Magruder, C.J. Designation of Three-Judge District Court, filed. Hon. Calvert Magruder, U.S. Circuit Judge and Hon. Peter Woodbury, U.S. Circuit Judge to sit with Hon. William T. McCarthy, U.S. District Judge.	
	14	Appearance of Malcolm V. McCabe for Mass. Retail Grocers and Provisions Dealers Assn., Inc., filed.	
	14	Marshal's return of summons with service on May 6, 1958.	
	24	Petition for leave to intervene of Archdiocesan Council of Catholic Men, filed.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
May 24	Petition for leave to intervene of The Lord's Day League of New England, filed.	
28	Appearances of counsel from City Solicitor's office in Springfield, Mass., for deft. Matthew J. Ryan, Jr., City Solicitor, John J. O'Connor and S. Thomas Martinelli, Assistant City Solicitors, filed.	
28	Defendant's motion to dismiss the complaint filed.	
June 11	Petition for leave to intervene filed by Mass. Federation of Labor.	
12	Petition to intervene as amicus curiae filed by Southern New England Conference of Seventh Day Adventists, filed.	
13	Plff's motion to amend complaint, filed. c/s	
19	Petition to intervene as amicus curiae filed by International Religious Liberty Association.	
23	McCarthy, J. Memorandum, filed. Petitions for leave to intervene filed by The International Religious Liberty Association, The Southern New England Conference of Seventh Day Adventists, The Mass. Federation of Labor, The Lord's Day League of New England and The Archdiocesan Council of Catholic Men of Boston—denied. Copies to counsel.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
July 11	Plffs' motion to amend complaint assented to and filed.	
23	Appearance of Joseph H. Elcock, Jr., Asst. Atty. Gen., for Governor and Attorney General of the Comm. of Mass., filed.	
24	Letter received from Avery, Dooley, Post & Avery cancelling notice of appeal.	
25	Defendant's answer, filed.	
25	Deft's brief in support of his motion to dismiss the complaint, filed.	
25	Plffs' memorandum in opposition to deft's motion to dismiss, filed.	
Oct. 1	Letters to counsel, case scheduled to be heard Oct. 20, 1958 at 10 AM.	
[fol. 3]		
8	Application for leave to intervene and file a brief on behalf of the Archdiocesan Council of Catholic Men and The Lord's Day League of New England, filed.	
8	McCarthy, D.J. Application for leave to intervene on behalf of the Archdiocesan Council of Catholic Men and The Lord's Day League of New England, allowed.	
20	Brief of International Religious Liberty Association and The Southern New England Conference of Seventh Day Adventists, filed.	
20	Brief of the Intervenors, Lord's Day League of New England and Archdiocesan Council of Catholic Men, filed.	

Date 1958	Filings—Proceedings	Amount Reported in Emolument Returns
Oct. 28	Reply brief of plaintiffs to brief of intervenors, Lord's Day League of New England and Archdiocesan Council of Catholic Men filed by the plaintiff.	
Nov. 7	Letters to counsel, case scheduled to be heard Nov. 13, 1958 at 11 AM.	
13	Brief of the Attorney General of the Comm. of Mass., filed.	
13	Circuit Court of Appeals Chief Judge Calvert Magruder and Circuit Court of Appeals Judge Peter Woodbury and District Court Judge William T. McCarthy—opening of hearing by presentation of argument on motion to dismiss by Joseph H. Elcock, Asst. Attorney General and argument by Herbert B. Ehrmann in opposition to motion with presentation of evidence. Stipulation as to Facts and itemized list of articles and services which may be sold on the Lord's Day, filed in court. Case taken under advisement, one week given plff's counsel to file reply brief.	
14	Supplemental Stipulation as to Facts, filed.	
20	Letter filed by Herbert B. Ehrmann for the plff c/o Clerk's Office to Hon. Calvert Magruder and Peter Woodbury and William T. McCarthy stating in effect plff will not file a further brief since no further legal discussion is needed.	

Date	*Filings—Proceedings*	*Amount Reported in Emolument Returns*
1958		
Dec. 10	Stenographic record of hearing Nov. 13, 1958, filed.	
1959		
Mar. 25	Stenographic record of hearing Nov. 13, 1958, filed.	
May 18	Magruder and Woodbury, Circuit Judges—Opinion of the Court, filed. Copies to counsel.	
June 4	McCarthy, J. Dissenting opinion of the court, filed. Appended to opinion is following: (a) Three copies of criminal complaints filed in Hampden County, Springfield. (b) Certified copy of incorporation of Crown Kosher Super-Market	
[fol. 4]	of Mass., Inc. (c) Bill of Complaint—Superior Court in Equity, Hampden, County, Springfield. (d) Summons (e) Appearance for respondent (f) Interlocutory decree continuing restraining order in force (g) docket entries (h) Brief for the Commonwealth (i) Brief for the Defendant (j) Defendant's Bill of Exceptions.	
12	Magruder and Woodbury, Circuit Judges—Final Decree, filed. Ordered, Adjudged and Decreed (1) That Chapter 136 of the Mass. General Laws (Ter. Ed.) as amended is unconstitutional void and unenforceable as applied to the plff in this action, in so far as it requires the Crown Kosher Super Market to remain closed on after it has remained closed on the preceding Fri-	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
	day night and Saturday; (2) That the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Mass. General Laws (Ter. Ed.), as amended, against the plffs in this action; and it is further Ordered, Adjudged and Decreed that the plffs recover the costs of these proceedings, to be taxed by the Clerk of this Court.	
June 12	Magruder and Woodbury, Circuit Judges—Ordered, Adjudged and Decreed that deft's motion to dismiss is denied.	
12	Copies of Final Decree and notice of denial of Deft's Motion to dismiss mailed to S. Thomas Martinelli, Asst. City Solicitor of Springfield and Joseph H. Elcock, Jr., Asst. Atty. General.	
12	Letter to Hon. Calvert Magruder, Chief Judge Court of Appeals from Joseph H. Elcock, Jr., Asst. Atty. General in accordance with request of Judge Magruder, filed.	
22	Attorney General's motion for new trial, filed. c/s	
July 7	Plaintiffs' Memorandum in Opposition to Defendant's Motion for a new trial, filed. c/s	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
July 9	Attorney General's Memorandum in Support of Motion for a New Trial, filed.	
20	Per Curiam Opinion of the Court, on Petition for Rehearing, filed. Copies to counsel.	
20	Magruder, USCJ (Ret.) Order, filed. Ordered, Adjudged and Decreed that the motion (for a new trial, filed by the Attorney General of the Comm. of Mass.) be, and the same hereby is, denied. Copies to counsel.	
[fol. 5]		
23	McCarthy, J. Memorandum, filed. Copies to counsel.	
Sept. 18	Appearance of Edward J. McCormack, Jr., Atty. Gen., for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher, Chief of Police, City of Springfield, Mass. and Edward J. McCormack, Jr., Attorney General, filed.	
18	Appearance of John Warren McGarry, Esq., Asst. Atty. General for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher and Edward J. McCormack, Jr., Atty. General.	
18	Appearance of Joseph H. Elcock, Jr., Esq., Asst. Atty. General for Governor of Massachusetts, Foster Furcolo, Raymond P. Gallagher and Edward J. McCormack, Jr., Esq., Atty. General.	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
Sept. 18	Appearance of S. Thomas Martinelli, Esq., City Solicitor, Springfield, Mass., for Raymond P. Gallagher, Chief of Police, City of Springfield, Mass.	
18	Notice of Appeal filed by the defendants Raymond P. Gallagher, Chief of Police of the City of Springfield, Mass. together with Edward J. McCormack, Jr., Attorney General of the Commonwealth of Massachusetts and Foster Furcolo, as he is Governor of the Comm. of Massachusetts and both entitled to notice as provided in 28 USC Sec. 2284 (2) hereby appeal to the Supreme Court of the U. S. from the Final Decree declaring Chapter 136 of the Mass. General Laws (Ter. Ed.) as amended, unconstitutional, void and unenforceable as applied to the pltffs and enjoining and restraining the defendant Raymond P. Gallagher from enforcing Sec. 5 of said Chapter 136 as against the pltffs. said decree having been entered on June 12, 1959. The said defendants further appeal from the Denial of the Defendant's Motion to Dismiss, also entered on June 12, 1959 and from the Denial of the Defendant's Motion for a New Trial, entered on July 20, 1959. This appeal is taken pursuant to 28 USC 1253. c/s to Herbert B. Ehrmann, Esq., Goulston & Storrs, 50 Federal St., Boston, Mass., Ribicoff and Kotkin, 64 Pearl St., Hartford, Conn., Fein, Cavanaugh & Kimball, 1421 Main St., Springfield, Mass.	

Date 1959	Filings—Proceedings	Amount Reported in Emolument Returns
Oct. 2	Appearance of Raya S. Drebenco—counsel for pltffs. filed.	
Oct. 2	Cross-Designation by Appellees by Herbert B. Ehrmann, Esq., et al. filed. c/s.	
Nov. 12	McCarthy, J. Dissenting Memorandum of Nov. 12, 1959, filed.	

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
..... DIVISION

Civil Action File No. 58-471-M

[Stamp
Office of
U. S. Marshal
May 5 3 33 PM '58
Dist. of Mass.]

[Title omitted]

SUMMONS—Filed May 14, 1958

To the above named Defendant:

You are hereby summoned and required to serve upon Herbert B Ehrmann and Goulston & Storrs plaintiff's attorney, whose address is 50 Federal Street Boston Massachusetts an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail

to do so, judgment by default will be taken against you for the relief demanded in the complaint.

John A Canavan, Clerk of Court, Frances R. Foley, Deputy Clerk.

[Seal of Court]

Date: May 5 1958

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 6a] RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 5th day of May 1958, I received this summons and thereafter on the 6th day of said May at 3 p. m., I summoned the within named defendant to answer as herein directed by giving to him in hand at Police Station Springfield in said District a true and attested copy of the within summons, together with copy of complaint.

Ralph W. Gray, United States Marshal, By Christopher Ghiloin, Deputy United States Marshal.

Marshal's Fees

Travel	$19.20
Service	2.00
	21.20

Subscribed and sworn to before me, a
this _____ day of _____, 19

[Seal] .....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his Deputy.

[fol. 7] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

COMPLAINT—Filed May 1, 1958

I. Jurisdictional Allegations

1. This is a suit of a civil nature praying for the convening of a Three-Judge District Court under 28 U. S. C. § 2284 for a preliminary and permanent injunction to restrain the enforcement, operation or execution of a state statute upon the ground of unconstitutionality. This suit also prays for the declaration of the rights and other legal relations of the interested parties seeking such declaration in an actual controversy between the Plaintiffs and the Defendant under the provisions of 28 U. S. C. §§ 2201-2202.

2. This suit arises under the Constitution of the United States, more particularly under the First and Fourteenth Amendments thereof, and under Title 42 U. S. C., § 1983. Jurisdiction of the matters involved in this suit is conferred on this court under the provisions of 28 U. S. C. § 1343 (3) [fol. 8] to redress and prevent the deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States and by acts of Congress; and under § 1331 as a civil action arising under the Constitution and laws of the United States.

3. The matter in controversy, between the Corporate Plaintiff and the Defendant, exceeds the sum of Three Thousand Dollars ($3,000) exclusive of interest and costs.

II. Statute Involved

4. The statute involved in this suit is Mass. G. L. (Ter. Ed.) c. 136 entitled "Observance of the Lord's Day". The sections of the said chapter which the Defendant seeks to enforce against the Plaintiffs are §§ 5-6 thereof, as amended,

a copy of which is attached hereto as Exhibit A and made a part of this Complaint. The Defendant has interpreted "Lord's Day" to mean Sunday. Section 6 recognizes that there are those who, according to their religious belief, observe Saturday as the Lord's day, but the purported relief extended to such persons is severely limited, discriminatory and impracticable.

III. The Parties and Factual Allegations

5. The Corporate Plaintiff, Crown Kosher Super Market of Mass., Inc. is a corporation duly organized under the laws of the Commonwealth of Massachusetts which owns and operates, and which, since October 1953, has owned and operated a kosher super market located at 59 Sumner Avenue in Springfield, hereinafter referred to as Crown Market, selling food to Orthodox and Conservative Jewish persons, prepared in accordance with the tenets of their religion.

[fol. 9] 6. Because of the religious convictions of the Corporate Plaintiff's stockholders, officers and managers, and because of religious regulations, it is closed at sundown on Friday and is not reopened until Sunday morning.

7. The Corporate Plaintiff serves approximately two thousand Orthodox and Conservative Jewish persons.

8. Its weekly volume averages approximately $15,000 gross and its Sunday volume averages approximately $5,000 gross.

9. Crown Market's Sunday clientele averages about five hundred customers, the great majority of whom, because of working hours and other considerations, would find it extremely difficult and in some cases impossible, to make all their kosher food purchases on week days.

10. Crown Market is open from eight o'clock A.M. to six o'clock P.M. Monday, Tuesday and Sunday and from eight o'clock A.M. to nine o'clock P.M. Wednesday and Thursday and from eight o'clock A.M. to sundown on Fridays. It is closed all day Saturday. Its Sunday trade, assuming that the customers could shop during the evening

hours, cannot adequately be served during the brief evening hours when said market is open.

11. Crown Market is a completely kosher super market under the constant supervision of the Rabbinical Council of Springfield, selling kosher groceries, kosher baked goods, kosher meats, kosher fish, kosher delicatessen, kosher dairy products, and fruits and vegetables. The said Rabbinical Council is recognized by persons of the Orthodox Jewish faith of the Springfield area as their religious authority.

12. Crown Market is the only market in the Springfield area where all types of foods bearing the necessary Rabbinical seals attesting to their being kosher may be purchased.

[fol. 10] 13. Crown Market serves and is patronized almost exclusively by the Orthodox and Conservative Jewish populations of Springfield and the surrounding area for a considerable radius which includes communities such as Holyoke, Longmeadow, Palmer, Turner Falls, Massachusetts and the northern part of Connecticut.

14. During the period of Passover, which lasts eight days, all food consumed by persons of Orthodox Jewish faith must be prepared under special conditions applicable to food to be consumed during the Passover period and must bear a special Rabbinical seal attesting thereto. At other times, said persons may eat only kosher meat, dairy products and certain other kosher foods.

15. The Plaintiffs, Irving Heafitz, Morris Chaitovsky and Mrs. Ruth Cohen, are Orthodox Jewish customers of Crown Market who eat kosher food because of religious convictions and who, because of their employment and religious beliefs, as more particularly set forth in Paragraphs 15 and 16 can conveniently do their weekly marketing only on Sunday. They bring this action on behalf of themselves and many others, a number of whom are listed in Exhibit B hereof, similarly situated. Orthodox Jewish customers of Crown Market who live at a distance and are dependent on the Crown Market for their securing kosher foods throughout the year on Sunday, and especially during Passover, number several hundred families, and it is, there-

fore, impractical to bring them all before the Court, but the Plaintiffs named in this paragraph are fairly representative of the group.

16. Plaintiffs, Irving Heafitz and Morris Chaitovsky, each live more than three miles from Crown Market. They are each married and have four children. Their wives are dependent on them for transportation to market. They [fol. 11] are both engaged in the junk business. Because of the type of work in which they are engaged they cannot market in their work clothes. They cannot return home from work, wash up, eat their dinner and reach the Crown Market on week nights in time to do all their weekly marketing.

17. Mrs. Ruth Cohen lives in Turner Falls Massachusetts. She is the mother of four children. Her husband is employed during the week. Because of her household duties she cannot reach Crown Market (or any other kosher market) during the week in time to do her weekly marketing.

18. Plaintiff, Rabbi Moses D. Sheinkopf, is the Chief Orthodox Rabbi of The United Orthodox Congregations of Springfield, charged with the duty of seeing that the Orthodox Jews in the Springfield area have foods prepared in accordance with the laws of Kashruth available to them. He is also President of the Massachusetts Council of Rabbis which is composed of all the Orthodox Rabbis in Massachusetts. The number of Orthodox Rabbis in Massachusetts number approximately fifty and it is, therefore, impracticable to bring them all before the Court. Rabbi Sheinkopf brings this action on behalf and at the request of all said Orthodox Rabbis.

19. The defendant, Raymond P. Gallagher, is Chief of Police of the City of Springfield, charged with enforcing Mass. G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended.

20. The defendant has authority to make arrests for violation of State statutes and has arrested and prosecuted the manager of Crown Market for keeping the store open on Sunday.

IV. Rights and Issues

21. Plaintiffs have a right preserved to them by the [fol. 12] First Amendment of the Constitution of the United States to the free exercise of their religion and to be protected against the establishment of any particular religion. Under the Fourteenth Amendment, the several states are forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or deprive any person of liberty or property without due process of law or which shall deny to any person within its jurisdiction the equal protection of the laws. Section 1983 of Title 42 U. S. C. provides that every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Said Mass. G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended, are unconstitutional and of no legal effect, in that they contravene the aforesaid rights in the following manner:

A. They establish the first day of the week, Sunday, as the Lord's day, contrary to the religion of the Plaintiffs.

B. Plaintiffs, Irving Heafitz, Morris Chaitovsky, Ruth Cohen, and Crown Market's other Orthodox customers who live at a distance from Crown Market cannot supply their dietary needs, in accordance with their religion, without interruption of their work on which they are dependent for a livelihood or other serious inconvenience.

C. Plaintiff, Rabbi Moses D. Sheinkopf, and the other Rabbis whom he represents, cannot fulfill their religious [fol. 13] duty to their congregations of making foods prepared in accordance with their religion at times when they are able to purchase them available to them.

D. Although the plaintiff, Crown Kosher Super Market of Mass., Inc. keeps its market closed on Saturday because

of the religious belief of its stockholders, officers, employees and customers, it is forced to keep its market closed on Sunday, also, so that it, Crown Kosher Super Market of Mass., Inc., is compelled to keep its market closed for two days in each week while other markets similarly situated but not sharing the religious beliefs of its stockholders, officers, employees and customers need be closed only one day in each week.

E. It permits the sale of numerous food products on Sundays by other stores and vendors, much of which is neither necessary nor in keeping with the Lord's day, while forbidding the sale, in said Plaintiff's store, of food products having a religious significance.

F. It denies to the Individual Plaintiffs the equal protection of the laws by restricting their opportunity to purchase requisite food to five days in each week because they observe Saturday as the Lord's day, whereas those who observe Sunday as the Lord's day may make food purchases on six days of each week.

G. It has become so riddled with exceptions permitting the sale of so many unnecessary food and other products, and so many entertainment, recreational and other activities not in keeping with the spirit of the Lord's day, that the statute is no longer a valid exercise of the police power of the state.

V. Allegations of Equitable Jurisdiction

22. There is an actual controversy between the Plain-[fol. 14] tiffs and the Defendant in respect to his right to enforce the provisions of Mass. G. L. (Ter. Ed.) c. 136, §§ 5-6, as amended, insofar as they effect the Plaintiffs and those whom they represent.

23. Plaintiffs have no adequate remedy at law.

24. If Plaintiff, Crown Kosher Super Market of Mass., Inc., is required to close Crown Market on Sundays, Plaintiffs will suffer irreparable injury in that: Plaintiff, Crown Kosher Super Market of Mass., Inc., will lose approximately one-third of its gross business; Plaintiff, Rabbi Moses D. Sheinkopf and the other Rabbis whom he represents will

be unable to fulfill their duties to their congregations; and, Plaintiffs, Irving Heafitz, Morris Chaitovsky, Ruth Cohen, and other customers of Crown Market whom they represent will be unable to secure provisions prepared in accordance with their religion at times when they are able to purchase them. There is no practical way in which the Plaintiff, Crown Kosher Super Market of Mass., Inc., can serve the needs of its customers, or its customers can fill said needs other than by the purchase and sale at retail in Crown Market on Sunday.

Wherefore, Plaintiffs Pray:

1. That this action be heard by Three-Judge Court under §2284, U. S. C. Title 28.

2. That the Court shall adjudge the said Mass. G. L. (Ter. Ed.) c. 136 §§5-6, as amended, unconstitutional, void and unenforceable as applied to the plaintiffs for the reasons heretofore stated.

3. That the Court shall issue a preliminary and final injunction, after notice and hearing, against the defendant, in his official capacity, and all other Massachusetts and local authorities who would have any authority to take [fol. 15] any action toward the enforcement of said laws and that such persons and defendants be enjoined and restrained from taking any steps whatsoever in court or out of court looking to the enforcement of the said laws.

4. Such other and further equitable relief as the plaintiffs may show themselves entitled to have.

Attorneys For Plaintiffs:

Herbert B. Ehrmann, Goulston & Storrs, 50 Federal Street, Boston, Massachusetts;

Irving S. Ribicoff, Ribicoff and Kotkin, 64 Pearl Street, Hartford, Connecticut;

Samuel L. Fein, Fein, Cavanaugh & Kimball, 1421 Main Street, Springfield, Massachusetts.

[fol. 16] *Duly sworn to by Harold Chernock, jurat omitted in printing.*

[fol. 17]

EXHIBIT A TO COMPLAINT

1957 Supplement, Annotated Laws of Massachusetts, Chapter 136, Sections 5 and 6, (2nd Ed.)

"*Sec. 5. Keeping Open Shop, etc., and Doing Certain Work etc., Prohibited.*

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars. (CL 133, Secs. 1, 2; 1692-3, 22, Sec. 1; 1716-7, 13, Sec. 1; 1727-8, 5, Secs. 1, 4; 1760-1, 20, Secs. 2, 9; 1782, 23, Sec. 1; 1791, 58, Sec. 1; 1796, 89, Sec. 1; RS 50, Sec. 1; GS 84, Sec. 1; 1862, 152; PS 98, Sec. 2; 1895, 434, Secs. 2, 4; RL 98, Secs. 2, 5; 1904, 460, Sec. 2; 1909, 423, Sec. 4; 1918, 257, Secs. 336, 338; 1919, 5; 1920, 2.)"

"*Sec. 6. Limit of Operation of Preceding Section.*

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail

sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

[fol. 18] Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers,

then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon; of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vege- [fol. 19] tables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing

and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibition held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section 4 A or section 4B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (RS 50, Sec. 10; GS 84, Sec. 9; PS 98, Sec. 13; 1886, 82; 1887, 391, Sec. 2; 1893, 41; 1895, 434, Sec. 2; 1900, 440; 1901, 80; RL 98, Secs. 3, 4; 1902, 414, Sec. 1; 1908, 126, Sec. 1; 273, Sec. 1; 333; 343; 1909, 420, Sec. 2; 423, Sec. 5; 1910, 327; 1911, 328, Sec. 1; 1914, 757, Sec. 1; 1916, 146, Sec. 1; 1917, 207; 1927, 175; 1928, 234; 929, 118; 1930, 143; 179; 1931, 240; 1932, 96; 1933, 150, Sec. 3; 1934, 328, Sec. 7; 1934, 354; [fol. 20] 1934, 373, Sec. 6; 1936, 189; 1937, 286; 1938, 143; 1943, 473; 1946, 207, Sec. 4; 1949, 190; 1950, 256, Sec. 1; 1950, 322; 1950, 681; 1951, 504; 1954, 217; 1955, 304, appvd. April 22, 1955; on the same day declared by the Governor to be an emergency law, effective therewith.)"

[fol. 21]

Exhibit B to Complaint

Partial List of Sunday Customers of Crown Market

Phillip Ginsberg	204 Commonwealth Ave.	Springfield, Mass.
Irving Mittleman	56 Garland Street	Springfield, Mass.
Jack Skuken	84 King Street	Springfield, Mass.
Goldie Skuken	69 Vadnais Street	Springfield, Mass.
Hannah Huwortz	126 Wheeler Avenue	Springfield, Mass.
Mrs. I. Leporetsky	119 Wheeler Avenue	Springfield, Mass.
Mrs. Edward Conter	68 Windsor Place	Longmeadow, Mass.
M. J. Alinston	258 Capen Street	Springfield, Mass.
Mrs. R. Heischbaut	30 Pinebrook Drive	Springfield, Mass.
Mrs. N. Libby		Enfield, Conn.
Seth Slade	47 Sanes Street	Springfield, Mass.
Al Greenberg	55 Sterling Street	Springfield, Mass.
Samuel A. Greenberg	37 Narragansett St.	Springfield, Mass.
Isadore Sender	37 Matten Street	Springfield, Mass.
William Daleslenoga	131 Johnson Street	Springfield, Mass.
Sol Chantam	15 Carroll Street	Springfield, Mass.
Irv Bernstein	89 Randolph Street	Springfield, Mass.
Beverly Goldberg	533 Dickenson Street	Springfield, Mass.
Ruth Stamborsky	84 Maryland Street	Springfield, Mass.
Bertha K. Rudek	109 Maryland Street	Springfield, Mass.
Mrs. L. Skecker	101 Woodlawn Street	Springfield, Mass.
M. E. Robbins	87 Bellevue Avenue	Springfield, Mass.
Harold Okem	78 Colony Road	W. Springfield, Mass.
Mrs. S. Severman	44 W. Crystal Brook St.	Springfield, Mass.
Mrs. S. Cohen	540 Dickinson Street	Springfield, Mass.
J. Weber	73 Biltmore Street	Springfield, Mass.
Samuel Chester	149 Pleasantview	Longmeadow, Mass.
Ray Humberston	8 Meredith St.	Springfield, Mass.
Robert Humberston	8 Meredith St.	Springfield, Mass.
Denise Humberston	8 Meredith St.	Springfield, Mass.
Rabbi E. Ziegler	40 Kennwoulth St.	Springfield, Mass.
Helen Shapiro	53 Rueleland St.	Springfield, Mass.
Merrill G. Block	50 Abbott St.	Springfield, Mass.
Ray K. Coen	19 Viola Road	Longmeadow, Mass.
Milton LaMelle	824 Sumner Avenue	Springfield, Mass.
Louis Flaks	54 Hebron St.	Springfield, Mass.
Sadie Nathanson		Holyoke, Mass.
Samuel Bean		Holyoke, Mass.
Mrs. M. Naitiarem		Holyoke, Mass.
L. Huber	58 Bronson Terr.	Springfield, Mass.
Alan Alpert	109 Greenland Street	Springfield, Mass.
Milton Rosenberg	67 Bilker Street	Springfield, Mass.
Jacob Libons	19 Kenard Road	Springfield, Mass.

Raymond W. Cossin	15 Rittenhouse Terr.	Springfield, Mass.
Norman Trudlind	18 Garden St.	Springfield, Mass.
Max Selgel	43 Plymouth Road	Longmeadow, Mass.
Joseph Chase	38 Narragansett St.	Springfield, Mass.
Milton Kaplan	71 Firglade Avenue	Springfield, Mass.
Guy Nessenbaum	101 So. Park Avenue	Longmeadow, Mass.
Abe Solomon	29 Homer Street	Springfield, Mass.
Helen Kisner	15 Graham Street	Springfield, Mass.
D. Selwitz	109½ Oak Lane Street	Springfield, Mass.
Sidney Romanoff	68 Daviston Street	Springfield, Mass.
J. F. Collins	6 Maplewood Terrace	Springfield, Mass.
F. Caplan	36 Warner Street	Springfield, Mass.
G. Sugliman	11 Priscilla Street	Springfield, Mass.

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L. Lehman	113 Lexington Street	Springfield, Mass.
H. Hallinstein	89 E. Alvord Street	Springfield, Mass.
H. H. Bettman		Westover, Mass.
Myer Ezrin	401 Commonwealth Ave.	Springfield, Mass.
Morris Buff	201 Commonwealth Ave.	Springfield, Mass.
Marilyn Greenberg	55 Sterling Street	Longmeadow, Mass.
Selma Greenberg	28 Sumner Avenue	Springfield, Mass.
M. Shepin	77 Commonwealth Ave.	Springfield, Mass.
Paul Bogus	119 W. Alvord Street	Springfield, Mass.
Irving Weiner	77 Virginia Street	Springfield, Mass.
Nathan Gordenter	452 Dickinson Street	Springfield, Mass.
Phillip Berman	215 Westbrook Drive	Springfield, Mass.
Earl Winer	76 Meadowbrook Road	Longmeadow, Mass.
Maurice Spevak	228 Navajo Road	Springfield, Mass.
Barnett Greenberg	184 Magerlin Circle	Longmeadow, Mass.
Bentzman	158 Woodlawn Street	Springfield, Mass.
H. Gerstein	31 Cherryvale Ave.	Springfield, Mass.
Julius Resnick	40 Oswego Street	Springfield, Mass.
Mrs. Murray Resnick	42 John Street	Springfield, Mass.
Mrs. Ida Brosky	44 John Street	Springfield, Mass.
Sherman Raner	320 Dwight Road	Springfield, Mass.
Aline Ehrlick	86 Longhill Street	Springfield, Mass.
Charlotte Meyer	567 Laurel Street	Longmeadow, Mass.
Mary Rome	35 Brookline Avenue	Springfield, Mass.
Fred Berman	75 Longhill Street	Springfield, Mass.
Myer Sadler	262 Harberek Street	Springfield, Mass.
Antonio Santaniello	119 Mentmorence St.	Springfield, Mass.
Mrs. R. H. Kanter	127 Hybrid Terrace	Springfield, Mass.
Esther Weiss	98 Monroe St.	Agawam, Mass.
Roman J. Partyke	106 Washburn St.	Springfield, Mass.
Lloyd Shabazz	538 Union Street	Springfield, Mass.
Harry Edlin	435 Tufton Road	Springfield, Mass.
Ethel Ruklas	26 Greenleaf St.	Springfield, Mass.
Norman Gelfand	507 Plainfield St.	Springfield, Mass.

Al Rosenthal	175 Chalmers Street	Springfield, Mass.
Jerome Kern	327 Commonwealth Ave.	Springfield, Mass.
Jennie Somell	11 Taft Street	Springfield, Mass.
Nathan Somell	11 Taft Street	Springfield, Mass.
Rabbiney Fein	108 Olmsted Drive	Springfield, Mass.
Mrs. Rault	172 Rayton Street	Springfield, Mass.
Pearler Aaron		Longmeadow, Mass.
Sophie Finn	161 Sumner Ave.	Springfield, Mass.
George Nutas	17 Rinsworth St.	Springfield, Mass.
Mary Cohen		Westfield, Mass.
Reuben Greenberg	1114 Allen Street	Springfield, Mass.
N. J. Fieldman	18 Livington Road	Springfield, Mass.
L. Lear	104 Sumner Ave.	Springfield, Mass.
A. Gertel	192 Long Street	Springfield, Mass.
A. Hirsch	1684 Northampton St.	Holyoke, Mass.
Charles Ruskin	214 Chapin Terrace	Springfield, Mass.
Bessie Alibes	292 Sumner Avenue	Springfield, Mass.
Morris Leskowicz	131 Hoodlawn Street	Springfield, Mass.
Joseph Norkin	32 Lexington Street	Springfield, Mass.
Max Leht	22 Lindsay Road	Springfield, Mass.
Paul Cohen	63 Longhill Street	Springfield, Mass.
Mrs. H. Ziff	62 Northampton St.	Springfield, Mass.
Martin M. Marcus	6 Piney Place	Springfield, Mass.
Reginard Z. Bloome	2433 Main Street	Springfield, Mass.
Mrs. Samuel Gaberman	129 Appleton Street	Springfield, Mass.
Alfred D. Cummings	46 Abewood Terr.	Holyoke, Mass.
[fol. 23]		
Sara G. Fisher	41 Palmyra Street	Springfield, Mass.
Jack Talburt	171 Hartford Terr.	Springfield, Mass.
Myer Falk	65 Harkness Avenue	Springfield, Mass.
Doris Zucker	16 Whitten Avenue	Springfield, Mass.
Mrs. Irving Perry	64 Vail Street	Springfield, Mass.
Mrs. Senior Katz	556 Laurel Street	Longmeadow, Mass.
Martin Lefebre	26 Coomes Road	Springfield, Mass.
Walter Vogel	37 Ft. Pleasant Terr.	Springfield, Mass.
M. Rothin	186 Ledyard Terr.	Springfield, Mass.
Morris Gelfand	507 Plainfield St..	Springfield, Mass.
Harry Landis	77 Whittier Street	Springfield, Mass.
G. Allan	30 Bellevue Avenue	Springfield, Mass.
Harry Solliter	82 Olmsted Drive	Springfield, Mass.
Stephen Smith	46 Eckington Street	Springfield, Mass.
Bessie Norkin	38 Kittrell Street	Springfield, Mass.
Mrs. Baker	136 Woodside Terr.	Springfield, Mass.
H. S. Krastin	54 Lester Street	Springfield, Mass.
George Steinberg	119 Fireglade Ave.	Springfield, Mass.
Gertrude Steinberg	119 Fireglade Ave.	Springfield, Mass.
Mrs. Ira Markowitz	93 Carver Street	Springfield, Mass.

Mrs. Carl Rudman	91 Carver Street	Springfield, Mass.
David Brook	63 Copeland Street	Springfield, Mass.
Bertram Shatz	30 Colony Acres Road	Longmeadow, Mass.
Louis Hurwitz	50 Derryfield Ave.	Longmeadow, Mass.
M. A. Polep	122 W. Crystal Brk. Dr.	Springfield, Mass.
Solomon Fagin	50 Burnside Terr.	Springfield, Mass.
Lenore Goldsmith	98 Brether Road	Springfield, Mass.
Irving Connick	141 Carver St.	Springfield, Mass.
Gerson Gordon	103 Bronson Terr.	Springfield, Mass.
Mrs. H. A. Levine	58 Olmsted Drive	Springfield, Mass.
Edward Torff	131 Ft. Pleasant Ave.	Springfield, Mass.
M. Bella	43 Jeffery St.	Springfield, Mass.
Carl Rudman	91 Carver Street	Springfield, Mass.
David Superman	89 Roosevelt Avenue	Springfield, Mass.
Harold Roschlin	44 Sumner Avenue	Springfield, Mass.
Herbert M. Posnee	136 Washington Road	Springfield, Mass.
Sylvia Rosen	58 Rockland St.	Springfield, Mass.
Lorraine Robbins	87 Bellevue Avenue	Springfield, Mass.
Mrs. G. Teefman	244 Sumner Avenue	Springfield, Mass.
Herbert Zewitz	51 Washington Street	Springfield, Mass.
N. Pengton	24 Sumner Avenue	Springfield, Mass.
Elaine Greenberg	96 Emerson Street	Springfield, Mass.
Jerome Krandall	85 Lynwood Drive	Springfield, Mass.
Victor Kusnetz	101 Groveland Street	Springfield, Mass.
Helen Ascher	76 Spruceland Ave.	Springfield, Mass.
Nicholas Damato	108 Brimson Street	Springfield, Mass.
Sidney Spungin	76 Byers Street	Springfield, Mass.
Milton Sheeasky	119 Marvyn Place	Springfield, Mass.
Jerome M. Pfeifer	190 Commonwealth Ave.	Springfield, Mass.
Lebe Gelstein	131 Cherryvale St.	Springfield, Mass.
Mrs. A. B. Abramson	63 Washington St.	Springfield, Mass.
Max Roos	121 Wayise Street	Springfield, Mass.
Joseph Hyman	350 Gillette Ave.	Springfield, Mass.
Seymour J. Boger	105 Olmsted Drive	Springfield, Mass.
Earle Davis	77 Longhill Street	Springfield, Mass.
Gerson Ashinas	191 Garland Street	Springfield, Mass.
Louis Kinsman	141 Reyfred Terrace	Springfield, Mass.
Marc Gwintch	18 Washington Road	Springfield, Mass.
Julius Green	218 Ft. Pleasant Ave.	Springfield, Mass.
Joseph Block	199 Chalmer St.	Springfield, Mass.

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Albert Schunitz	169 Abbott Street	Springfield, Mass.
Robert S. Ehzlick	86 Longhill Street	Springfield, Mass.
Milly Rome	133 Lexington Street	Springfield, Mass.
Marcia Schwartz	166 Garland Street	Springfield, Mass.
Mrs. Dorothy Sadler		
Marion Needle	73 So. Main St.	Brattleboro, Vt.

vin Needie	73 So. Main St.	Brattleboro, Vt.
ian Horowitz	248 Ft. Pleasant Ave.	Springfield, Mass.
old A. Levine	58 Olmsted Drive	Springfield, Mass.
aid B. Caplan	36 Warner Street	Springfield, Mass.
den T. Frye	118 Longhill Street	Springfield, Mass.
Hirshan	48 Gilman Street	Holyoke, Mass.
B. Frust	62 Cherryvale Ave.	Springfield, Mass.
Selectmen	32 Greenwood Ave.	Holyoke, Mass.
T. Gurvitsh	64 Beacon Avenue	Holyoke, Mass.
ie Rothenberg	378 Appleton Street	Holyoke, Mass.
David Samon	383 Hillside Ave.	Holyoke, Mass.
s Kobrosky	105 Packard Ave.	Springfield, Mass.
S. Weinstein	22 Carol Lane	Holyoke, Mass.
B. Soltz	88 Westfield Road	Holyoke, Mass.
Weinstein	22 Cural Lane	Holyoke, Mass.
C. Kaze	84 Lindale Street	Springfield, Mass.
inclair	579 Laurel St.	Longmeadow, Mass.
Norkin	38 Kittrell St.	Springfield, Mass.
y Abramson	126 Woodside Terr.	Springfield, Mass.
Feldman	128 Carver Street	Springfield, Mass.
y Bogoffe	65 Sumner Avenue	Springfield, Mass.
Vidantz	784 Allen Street	Springfield, Mass.
ard J. Queen	72 Virginia Street	Springfield, Mass.
e Ginsberg	11 Biltmore St.	Springfield, Mass.
ha B. Laub	20 Sumner Avenue	Springfield, Mass.
on B. Levine	48 Eddywood Street	Springfield, Mass.
ene Tarsky	188 Commonwealth Ave.	Springfield, Mass.
nare	Hirshall St.	Springfield, Mass.
p Zeller	62 Olmsted Drive	Springfield, Mass.
ert Srige	118 Longhill Street	Springfield, Mass.
ard H. Juros, DDS	Westover AFB	Westover, Mass.
me Braf	116 Larkspur St.	Springfield, Mass.
ph Bernstein	472 Carebb St.	Springfield, Mass.
y Kisher	65 Laurel Street	Longmeadow, Mass.
ur Pomerantz	55 Blaine Street	Springfield, Mass.
M. Chase	91 Ridge Road	Longmeadow, Mass.
an E. Learner	117 Firglade Ave.	Springfield, Mass.
. Shapiro	39 Mansfield Street	Springfield, Mass.
ph Chestein	18 Parkwood St.	Springfield, Mass.
Roberts	178 Woodlawn St.	Springfield, Mass.
M. Goodman	180 Woodlawn St.	Springfield, Mass.
R. Alpert	180 Woodlawn St.	Springfield, Mass.
C. Alake	42 Elwood Drive	Springfield, Mass.
Kosinski	136 Cabot Street	Springfield, Mass.
an Stein		Holyoke, Mass.
s Gillbe	61 Forest Park Ave.	Springfield, Mass.
Annette C. Spivak		Springfield, Mass.
p Katzman	440 Summer Avenue	Springfield, Mass.

Sam Schlon	8 Grassy Gutter Rd.	Springfield, Mass.
Max Nugher	133 Fountain St.	Springfield, Mass.
Nathan S. Elkin	274 Orange Street	Springfield, Mass.
Dinah Domowitz	274 Orange Street	Springfield, Mass.
Saul Finestone	85 Belmont Avenue	Springfield, Mass.
D. Chester	22 Crown Street	Springfield, Mass.

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Henry Zilkin	50 Jefferson Avenue	Springfield, Mass.
Philys Winniman	54 Fountain Street	Springfield, Mass.
A. Rosenfeld	152 Belvidere Street	Springfield, Mass.
R. Tevelav	58 Euclid Avenue	Springfield, Mass.
M. Press	41 Mallowhill Road	Springfield, Mass.
P. Rudef	109 Maryland St.	Springfield, Mass.
Victor Baker	75 Seyfred Terr.	Springfield, Mass.
Samuel Tyler	16 Sachem Street	Springfield, Mass.
Robert Zivire	147 Cooley Drive	Longmeadow, Mass.
Harriet Beelser	148 Cooley Drive	Longmeadow, Mass.
Min Mittleman	156 Garland Street	Springfield, Mass.
Milton Kanuan	12 Sheldon Street	Springfield, Mass.
Albert Pevizan	16 Belmont Place	Springfield, Mass.
Herman E. Ishin	151 Sumner Ave.	Springfield, Mass.
Martin Sinclair	70 Wexford Street	Springfield, Mass.
Louis Black	22 Warner Street	Springfield, Mass.
Lloyd Gilman	83 Longhill Street	Springfield, Mass.
Abraham Or	55 Crown Street	Springfield, Mass.
Gerald S. Naidorf	10 Brookline Avenue	Holyoke, Mass.
Harold Haberman	177 Hillside Ave.	Holyoke, Mass.
Mrs. Carl Rudman	91 Carver Street	Springfield, Mass.
Harold L. Rudman	91 Carver Street	Springfield, Mass.
Mrs. Ruth Markowitz	93 Carver Street	Springfield, Mass.
B. Daniels	34 Edson Street	Longmeadow, Mass.
Norris Peilman	137 Shawnut Street	Springfield, Mass.
Janet L. Juros	2-c McNary Street	Westover, AFB, M
K. Mushnitsky	102 Belle Street	Springfield, Mass.
Norman Steinberg	61 Texie Drive	Springfield, Mass.
David C. Wieter	82 Sunset Street	Springfield, Mass.
Mrs. B. Waldman	86 Woodside Terr.	Springfield, Mass.
Robert Miller	39 Spruceland Ave.	Springfield, Mass.
Samuel Cohen	159 Cooley Drive	Longmeadow, Mass.
H. Rosenbloom	61 Pomeroy Avenue	Pittsfield, Mass.
Seymour Rockster	28 Lexington Road	Longmeadow, Mass.
Mrs. M. Kaplan	496 White Street	Springfield, Mass.
Charles Becker	156 Woodlawn Street	Springfield, Mass.
Estelle Fialky	33 Dorset Street	Springfield, Mass.
Leslie Daniels	220 Woodlawn Street	Springfield, Mass.
Pauline Apelbaum	83 Ft. Pleasant Ave.	Springfield, Mass.
Rose Kainson		Turners Falls, Mass

ny Blaisberg		Greenfield, Mass.
ry B. Greenberg	28 Sumner Avenue	Springfield, Mass.
k Faggle	259 Trafton Road	Springfield, Mass.
eph Schulhoff		Athol, Mass.
aham Diamond	84 Burnside Terr.	Springfield, Mass.
ris Hyte	33 Elwood Drive	Springfield, Mass.
uel Seigel	138 Woodlawn Street	Springfield, Mass.
k Gladstone	103 Draper Street	Springfield, Mass.
R. Flesker	168 Prospect Street	Springfield, Mass.
ry Jeinstein	Locust Street	Springfield, Mass.
Lobyman	446 Sumner Ave.	Springfield, Mass.
uters	89 Fox Hill Road	Springfield, Mass.
is Muhaelsm	56 Portland Street	Springfield, Mass.
W. Allen	124 Lecun Drive	Longmeadow, Mass.
ie Beeker	55 Bellin Avenue	Springfield, Mass.
ph D. Grant	18 Lawndale Street	Springfield, Mass.
nard S. Meyer	17 Sumner Avenue	Springfield, Mass.
aham Greenberg	74 Mill Street	Springfield, Mass.
h I. Rosenthal	158 Gillette Ave.	Springfield, Mass.
Morris Akum	849 Dickinson St.	Springfield, Mass.
ed A. Macknee	86 Woodside Terr.	Springfield, Mass.

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iam Herman	25 Tiffany Street	Springfield, Mass.
David Kern		Springfield, Mass.
nio Aetneli	184 Winton Street	Springfield, Mass.
Lurystone	238 Sumner Avenue	Springfield, Mass.
i W. Roberts	30 Soreny Street	Longmeadow, Mass.
jamin Daniels	125 Woodlawn Street	Springfield, Mass.
Thal	44 Washington Road	Springfield, Mass.
aham Zarr	118 Brunswick St.	Springfield, Mass.
ris Glushein	48 White Street	Springfield, Mass.
ert Kampen	3 Olmsted Drive	Springfield, Mass.
ed Shuthel	38 Leyperd Terr.	Springfield, Mass.
t Tezon	100 Bronson Terr.	Springfield, Mass.
A. Kle	109 Sunset Drive	Springfield, Mass.
Rogow	744 White Street	Springfield, Mass.
n Steinborl	74 Maryland Street	Springfield, Mass.
nor Cowen	1032 Sumner Avenue	Springfield, Mass.
H. Lubman	69 Longhill Street	Springfield, Mass.
den Kagan	72 Allen Road	Longmeadow, Mass.
on Daniels	220 Woodlawn St.	Springfield, Mass.
Klein	899 Worthington St.	Springfield, Mass.
aks	895 Worthington St.	Springfield, Mass.
V. Buck	109 Pineywood Ave.	Springfield, Mass.
g Tariff	70 Keep Road	Springfield, Mass.
hell L. Smith	46 Eckington St.	Springfield, Mass.
rietta Saks	899 Worthington St.	Springfield, Mass.

Mrs. H. Epstein	21 Longfellow Terr.	Springfield, Mass.
M. J. Wall	51 Fort Pleasant St.	Springfield, Mass.
Mrs. H. Rosen	81 Tecumsah Drive	Longmeadow, Mass.
Mrs. Snow	104 Lefed Terr.	Springfield, Mass.
Mrs. Kalen	1594 Dwight Street	Springfield, Mass.
Mrs. Baumer	1706 Dwight St.	Springfield, Mass.
Paul Dusur	27 Bronsin Terr.	Springfield, Mass.
B. Smith	28 W. Allen Ridge Rd.	Springfield, Mass.
Mrs. S. Cohen	92 Leyfred Terr.	Springfield, Mass.
Mrs. Keith Sylvin	1220 Wilbraham Road	Springfield, Mass.
Arthur S. Rivkin	88 Somerset Street	Springfield, Mass.
Mrs. M. Ulise	45 Sylvan Street	Springfield, Mass.
Robert Arler	47 Brookline Ave.	Springfield, Mass.
Louis Rubin	437 Hillside Avenue	Springfield, Mass.
Mrs. M. Birnbaum	132 Groveland St.	Springfield, Mass.
Mr. William Neitz	110 W. Alvord Street	Springfield, Mass.
Libby S. Bogen	105 Olmsted Drive	Springfield, Mass.
Milton Birnbaum	132 Groveland St.	Springfield, Mass.
Leonard J. Allen	17 Remy Ave.	Northampton, Mass.
Florence H. Boher	62 Wood Avenue	Springfield, Mass.
Mrs. Bessie Katz	72 Orlens Street	Springfield, Mass.
Mrs. S. Small	5317 Westwood Ave.	Springfield, Mass.
Mrs. R. Mirkin	2 Webber St.	Longmeadow, Mass.
Yetta Simmons	247 Commonwealth Ave.	Springfield, Mass.
Belle Wolpert	149 Sumner Avenue	Springfield, Mass.
Gloria Bernstein	22 Ferrante Ave.	Greenfield, Mass.
J. Cohen	52 Church Street	Ware, Mass.
L. Sheer	111 Fort Pleasant Ave.	Springfield, Mass.
Joseph S. Lavin	41 Wilken Drive	Longmeadow, Mass.
Samuel Schinoff	122 W. Alvord St.	Springfield, Mass.
Harold Fireson	87 Maryland St.	Springfield, Mass.
Philys P. Ritter	65 Kittenhouse Terr.	Springfield, Mass.
David Simons	215 Woodlawn Street	Springfield, Mass.
Harry Gitting	54 West Alvord St.	Springfield, Mass.
Jack Sack	55 Alsell Street	Springfield, Mass.

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M. Feinstein	44 Greenwich Road	Longmeadow, Mass.
Rabinowicz	240 Locust Street	Springfield, Mass.
H. Schwartz	76 Olmsted Drive	Springfield, Mass.
M. Weiss.	107 West Alvord Street	Springfield, Mass.
Gidor Kaplan	19 Blodget Street	Springfield, Mass.
Ed Mackle	412 Gillett Avenue	Springfield, Mass.
George Scott	476 Cold Spring Ave.	W. Springfield, Mass.
Elisabeth Rushton	52 Webber Street	Springfield, Mass.
Elinor Rickless	54 Edgewood Ave.	Longmeadow, Mass.
Hayes Rickless	54 Edgewood Ave.	Longmeadow, Mass.
M. Brandeese	91 Longhill St.	Springfield, Mass.

Sidney Resnick	105 Narragansett St.	Springfield, Mass.
W. Millman	975 So. Brandibury St.	Springfield, Mass.
ob C. Rosenfeld	28 Longview St.	Springfield, Mass.
nry A. Black	33 Beechwood Avenue	Springfield, Mass.
bin Kimball	17 Calhoun Street	Springfield, Mass.
ne Fieldman	81 Willsen Drive	Longmeadow, Mass.
rris Gordon	129 Gillett Ave.	Springfield, Mass.
rge I. Levine	94 Tecumseh Drive	Longmeadow, Mass.
ard Grisley	68 Thorndyke St.	Springfield, Mass.
Sanders	70 Moarelift St.	Springfield, Mass.
lyn Searleman	69 Burnside Terr.	Springfield, Mass.
hard Weinberg	257 Cooper Street	Springfield, Mass.
rold Macklin	63 W. Alvord Street	Springfield, Mass.
nuel R. Rothman	63 Park Edge Ave.	Springfield, Mass.
Philip B. Label	152 Linfred Terrace	Springfield, Mass.
han Elyten	133 Elmwood Avenue	Longmeadow, Mass.
tin Lind	177 Cooper St.	Springfield, Mass.
s. Charles Basin	62 Randolph St.	Springfield, Mass.
Barnard	34 Meriden St.	Springfield, Mass.
id Rubin	7 Wiler Avenue	Springfield, Mass.
A. Sinclair	23 Carver Street	Springfield, Mass.
in Young	619 Samuel Street	Longmeadow, Mass.
a Lanoms	99 Carver Street	Springfield, Mass.
lter Berman	140 Woodlawn Street	Springfield, Mass.
ng M. Lazerus	58 Livingstone Ave.	Pittsfield, Mass.
nard Glapin	59 Olmsted Avenue	Springfield, Mass.
rry Shultz	142 Fountain Street	Springfield, Mass.
rill Fein	12 Somerset Street	Springfield, Mass.
alie Pottern	65 Meredith Street	Springfield, Mass.
k Allen	42 Colchester St.	Springfield, Mass.
lma Shrinkas	112 Mark Road	Springfield, Mass.
el Neigher	94 Sylvan Street	Springfield, Mass.
ise K. Learner	117 Firglade Avenue	Springfield, Mass.
lyn Silverman	127 Tecumseh Drive	Longmeadow, Mass.
line Siegel	123 Harkness Avenue	Springfield, Mass.
Finerman	107 Shawmut Street	Springfield, Mass.
ph Reisner	69 Washington St.	Springfield, Mass.
an Zuitsluk	70 Burnside Terr.	Springfield, Mass.
rge Brandwere	460 Laurel Street	Longmeadow, Mass.
land Lile	43 Somerset Street	Springfield, Mass.
id Cowen	1032 Sumner Avenue	Springfield, Mass.
nces Shames	119 Groveland Street	Springfield, Mass.
n Kohn	52 Alsace Street	Springfield, Mass.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed May 6, 1958

Upon the verified complaint, the plaintiffs move the court as follows:

1. To issue a preliminary injunction suspending and restraining the operation, enforcement and execution of Massachusetts G. L. (Ter. Ed.) c. 136 §§ 5-6, as amended, which are specified in Paragraph 4 of the Complaint in the above-entitled action, pending the final hearing and determination of this cause.

The grounds of this motion as more fully set forth in the Complaint are that:

A. Said laws of the Commonwealth of Massachusetts complained of are invalid.

B. The defendant, unless enjoined, threatens to enforce said laws.

C. Said laws are causing and will cause immediate and irreparable injury to plaintiffs.

D. Unless the operation and enforcement of the laws be restrained pending final disposition of the action, the [fol. 29] injury to plaintiffs in the interim will be irreparable even by final judgment for plaintiffs.

E. No injury will be sustained by the defendant or by the public through issuance of a preliminary injunction.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one

of whom shall be a circuit judge, in accordance with the provisions of § 2284, Title 28, United States Code.

Attorneys for plaintiffs:

Herbert B. Ehrmann, 50 Federal Street, Boston, Mass.;

Irving S. Ribicoff, 64 Pearl Street, Hartford, Conn.;

Samuel L. Fein, 1421 Main Street, Springfield, Mass.

NOTICE OF MOTION—May 6, 1958

To: The Hon. Foster Furcolo, Governor of the Commonwealth of Massachusetts.

The Hon. George Fingold, Attorney General of the Commonwealth of Massachusetts.

Raymond P. Gallagher, in his position as Chief of Police of the City of Springfield, defendant in the above-entitled action:

You and each of you, are hereby given notice pursuant to the provisions of § 2284 of Title 28 of the United States Code, that the United States District Court for the District of Massachusetts, has set for hearing and determination in the Federal Court Room in the Building, in the City of Commonwealth of Massachusetts, on the day of May, 1958, at o'clock in the noon of that day, the application for an interlocutory injunction in the above-entitled action to enjoin the enforcement of §§ 5-6, Massachusetts G. L. (Ter. Ed.) c. 136, as amended, by enjoining the acts of Raymond P. Gallagher, in his official capacity as Chief of Police of the City of Springfield, Massachusetts, his successor in office, and all other Massachusetts and local [fol. 31] authorities who would have any authority to take any action toward the enforcement of said laws, requiring plaintiff corporation to keep its market closed on Sunday, or bringing criminal action against plaintiff corporation, on the ground that said laws violate the Constitution of

the United States in that said laws contravene the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

There is served upon each of you herewith, copies of the Complaint in said cause, Application to the Chief Judge and the order convoking a three judge court for the hearing of said application as provided for by § 2284 of Title 28 of the United States Code.

Dated, May 6th, 1958.

Attorneys for plaintiffs:

Herbert B. Ehrmann, Gou-ton & Storrs, 50 Federal Street, Boston, Massachusetts;
Irving S. Ribicoff, Ribicoff and Kotkin, 64 Pearl Street, Hartford, Connecticut;
Samuel L. Fein, Fein, Cavanaugh & Kimball, 1421 Main Street, Springfield, Massachusetts.

[fol. 32] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT—
Filed May 28, 1958

Now comes the defendant and moves that the Court dismiss the complaint for the following reasons:

1. The complaint fails to allege adequate grounds on which relief can be granted.

2. The complaint fails to allege adequate grounds on which the Court can assert its equitable jurisdiction.

3. The complainants have an adequate redress at law by resort to the courts of Massachusetts.

4. On the face of the complaint, it does not appear that the complainants' liberty or property has been unconstitutionally interfered with by the defendant.

5. The individual complainants are not persons whose activities are regulated by the statute attempted to be drawn in question by the complaint and therefore have no standing to question its constitutionality.

Raymond P. Gallagher, Chief of Police of the City of Springfield, By Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, His Attorneys, Address: City Hall, 36 Court St., Springfield, Massachusetts.

[fol. 33] [File endorsement noted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

PLAINTIFFS' MOTION TO AMEND COMPLAINT—
Filed June 13, 1958

Now come the Plaintiffs and move to amend their Complaint heretofore filed by them by adding the following new paragraph: to be numbered No. 18 (a) following Paragraph No. 18 on Page 5 of the Complaint:

"18 (a) All of the Plaintiffs are residents and citizens of the Commonwealth of Massachusetts, pay taxes to the Commonwealth and to its political subdivisions, and portions of the taxes so paid are used to pay for the enforcement of Mass. G.L. (Ter. Ed.) c. 136, Sec. 5 thereof."

By their attorneys,

Herbert B. Ehrmann, Edward L. LaVine, of Goulston & Storrs, 50 Federal Street, Boston, Mass.

[fol. 33a] Certificate of Service (omitted in printing).

[fol. 34] IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

PLAINTIFFS' MOTION TO AMEND COMPLAINT—
Filed July 11, 1958

Now come the Plaintiffs and move to amend their Complaint heretofore filed by them by adding at the end of Paragraph 20 on Page 5 the following new sentence:

"Unless restrained by this court the Defendant will enforce G.L. (Ter. Ed.) c. 136 Section 5 thereby causing the Corporate Plaintiff's store to close on Sundays except for the hours between six A.M. and ten A.M. for the sale of kosher meat only and not for the sale of other kosher products, an exception which affords no practical relief to the Plaintiffs."

By their attorneys,

Herbert B. Ehrmann, Edward L. LaVine, of Goulston & Storrs, 50 Federal Street, Boston, Massachusetts.

We assent to the allowance of the foregoing motion.

Matthew J. Ryan, Jr., John J. O'Connor, S. Thomas Martinelli, Attorneys for Defendant.

Allowed.

William T. McCarthy, D.J.

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

DEFENDANT'S ANSWER—Filed July 25, 1958

1. Now comes the defendant in the above entitled action and as to each and every allegation contained in paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 24 of the complaint, denies that he has knowledge or information thereof sufficient to form a belief.

2. The defendant denies the allegations in paragraph 3 of the complaint.

3. The defendant admits the allegations in the third sentence of paragraph 4 of the complaint but denies that the relief extended by General Laws chapter 136 section 6 to persons who observe Saturday as a Lord's day is severely limited, discriminatory or impracticable.

4. The defendant admits the allegation in Paragraph 19 of the Complaint that he is the Chief of Police of the City of Springfield and charged with enforcing Massachusetts General Laws chapter 136 sections 5 and 6, as amended.

5. The defendant admits the allegation in Paragraph 20 of the Complaint that he has authority to make arrests for violation of State laws and has arrested and prosecuted the manager of the Crown Market, one Harold Chernock, for keeping the store open on Sunday, in violation of Gen-
[fol. 36] eral Laws chapter 136 sections 5 and 6; said prosecution resulting in the conviction of the said Chernock in the Hampden County Superior Court of the Commonwealth of Massachusetts. Said Chernock appealed from the conviction to the Supreme Judicial Court of the Commonwealth of Massachusetts, and in a decision recorded in 1957 Advance Sheets, at page 1057, entitled "Commonwealth vs. Harold Chernock", said convictions were upheld.

6. The defendant admits the allegation in paragraph 21 of the complaint that the plaintiffs have a right under the First Amendment of the Constitution of the United States to the free exercise of their religion and to be protected against the establishment of any particular religion, and that under the Fourteenth Amendment the States are forbidden to make or enforce any law which abridges the privileges or immunities of citizens of the United States or deprive any person of liberty or property without due process of law or denies any person his equal protection of (sic)
The defendant admits that Section 1983 of Title 42 U. S. C. is as set out in the complaint. The defendant denies that General Laws (Ter. Ed.) chapter 136, sections 5 and 6, as amended, are unconstitutional and of no legal effect, and says that said laws are constitutional and are in full force and effect. The defendant denies that he has knowledge or information as to the allegations in subparagraphs (A), (B), (C) and (D) of paragraph 21 of the complaint, and the defendant denies the allegations in subparagraphs (E), (F) and (G) of paragraph 21 of the complaint.

7. The defendant admits the allegation in paragraph 22 of the complaint as to a controversy between the plaintiff Crown Kosher Super Market of Mass., Inc. and denies that he has knowledge or information thereof sufficient to form a belief as to whether or not there exists a controversy between the individual and representative plaintiffs and himself, and further answering the defendant says that by a bill in equity filed in the Hampden County Superior Court of the Commonwealth of Massachusetts [fol. 37] the Crown Kosher Super Market of Mass., Inc. sought injunctive relief against the defendant from prosecution under General Laws (Ter. Ed.) chapter 136 sections 5 and 6 and that on June 25, 1954 an interlocutory decree was entered in said court; continuing in force a restraining order issued under the first prayer in said bill. This interlocutory decree was continued in force by agreement of the parties, pending the disposition of the appeal of

Harold Chernock in the criminal case heretofore mentioned and is still continuing on the date that this answer is filed.

8. The defendant denies the allegation in paragraph 23 of the complaint and says that the plaintiffs have an adequate remedy at law, particularly in view of the restraining order of the Hampden County Superior Court of the Commonwealth of Massachusetts, which is still in force, restraining the defendant Raymond P. Gallagher from enforcing General Laws chapter 136 sections 5 and 6.

9. And further answering the defendant says that he is informed and believes, and therefore avers that the petitioner, Crown Kosher Super Market, sells food of various descriptions, other than Kosher food, and therefore denies that if this law is enforced the Crown Kosher Super Market will lose approximately one-third of its gross business.

10. And further answering, as to the allegations in paragraph 18A of the plaintiffs' amended complaint, the defendant denies that he has knowledge or information thereof sufficient to form a belief.

Raymond P. Gallagher, Chief of Police of the City of Springfield, By Matthew J. Ryan, Jr., S. Thomas Martinelli, John J. O'Connor, His Attorneys, Address: City Hall, 36 Court Street, Springfield, Mass.

[fol. 38] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC., Corporate Plaintiff, et al.,

vs.

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, MASSACHUSETTS, Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS —June 12, 1959

This cause came on for hearing on Defendant's Motion to Dismiss the Complaint, and after hearing counsel and upon consideration thereof, it is ordered, adjudged and decreed that Defendant's Motion be and the same is hereby:

Denied.

Dated: 12 June 1959

Calvert Magruder, Peter Woodbury

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

STIPULATION AS TO FACTS—Filed November 13, 1958

The parties to the above-entitled suit hereby stipulate as follows:

I. Unless restrained in these proceedings, the defendant will enforce the provisions of Mass. G.L. (Ter. Ed.) c. 136 to the full extent of his authority.

II. There is no case now pending in the state courts of Massachusetts against the corporate plaintiff or its Manager, Harold Chernock, involving the enforcement of Mass. G.L. (Ter. Ed.) c. 136 or by either of them to stay proceedings under said Act.

The corporate plaintiff's Manager, Harold Chernock, was convicted by the District Court of Springfield for keeping open a shop on Sunday in violation of G.L. c. 136 at the address of the corporate plaintiff; the said Chernock appealed to the Superior Court for Hampden County and was convicted after trial. Thereafter, the said Chernock took his exceptions to the Supreme Judicial Court of Massachusetts. These exceptions were subsequently overruled in an opinion, *Com.* v. *Chernock*, Mass. A.S. 1057 on November 13, 1957.

After the proceedings in the District Court of Springfield, the corporate plaintiff filed a bill in equity in the Superior Court of Hampden County to restrain Raymond [fol. 40] P. Gallagher, Chief of Police of the City of Springfield, from serving further complaints upon the petitioner until such time as the case of *Com.* v. *Chernock* had been decided. The court issued such a preliminary injunction. Following the decision in *Com.* v. *Chernock*, a final decree was entered dismissing the bill in equity.

III. For purposes of these proceedings only, the following supplemental factual allegations are true:

A. *Concerning Orthodox Judaism.*

Orthodox Judaism is one of the three great branches of Judaism in our country. The other divisions are known as "Conservative" and "Reform". Followers of the Orthodox faith are distinguished from the others by their strict observance of the tenets and practices of traditional Judaism. Followers of the Conservative faith include many who are also strict observers of traditional Judaism, especially with respect to keeping a Kosher household.

Included in practices of all Orthodox Jews and many Conservative Jews are the following:

1. *Strict Observance of the Sabbath.*

In all branches of Judaism, the Sabbath begins at sundown on Friday and ends at sundown on Saturday. Dur-

ing the course of the year, there is a variance of approximately four hours in the time of observing sundown. This means that in each week the Sabbath begins and ends at changing times.

Although all members of the Jewish faith reverence and observe their Sabbath to some extent (including some of the observances hereinafter mentioned), the following are characteristic of the observances of all Orthodox and many Conservative Jews:

During the Sabbath hours, they do not conduct business, nor do they buy or sell for commercial or personal pur- [fol. 41] poses. They do not ride in automobiles or carriages. Although permitted to walk, they are sharply limited as to distance.

They do no cooking on the Sabbath. All food to be eaten on Friday evening and on Saturday is prepared on Thursday or Friday.

Friday evening is in the nature of a family festival. The meal is traditionally the best meal of the week. It is marked by a weekly family get-together, the lighting of candles and special Sabbath prayers. It is a sacred and joyous occasion for giving thanks to the Lord for his blessings and for the promotion of family affection and solidarity.

Saturday morning is marked by extended Sabbath services in the synagogues. The close of the Sabbath on Saturday is frequently marked by a general gathering of members of the congregation at the synagogue for socializing in celebration of the Sabbath.

2. *Dietary Regulations.*

The dietary regulations followed by Orthodox and many Conservative Jews are quite complex. They go far beyond the matter of ritual slaughter and the prohibition of pork products, which are the dietary laws best known to the general public. Only certain types of fish and fowl may be eaten. In no case may any dairy products be eaten with or mingled with meat products. No packaged food may be eaten which contains such a mixture or which utilizes pork products such as lard. The duty of supervising the food purchased by Orthodox Jews is imposed upon the Chief Rabbi of the area assisted by a number of inspectors. The

Rabbi or his inspectors visit the Kosher groceries and butcher shops daily except Saturday. They check the food offered for sale, both raw and packaged, to ascertain whether it complies with the laws of Kashruth (Kosher). When fresh meat is approved, the inspector impresses a [fol. 42] date stamp upon it. Fresh meat may not remain for more than seventy-two hours without water. Since the Crown Market is closed from sundown on Friday to Sunday morning, the Rabbi or one of his inspectors, in any event, must visit the Market to ascertain that meat which arrived on the preceeding Thursday or earlier is re-washed on Sunday. A statement of some of the dietary laws and procedures is contained in a publication known as "Kashruth", published by the Union of Orthodox Jewish Congregations of America and Rabbinical Council of America which may be shown to the court or introduced as an exhibit.

3. *Hospitality.*

Among Orthodox Jews there is the tradition of extending hospitality to transient Jews in the community. These travelers or transients apply to the Rabbi who then sends them to the homes of members of his congregation where the guests find a traditionally Jewish home. The Plaintiffs, Chaitovsky and Heafitz, are among those on whom the Rabbi relies for this service. These guests arrive at unexpected times, and when this happens, there may be an unanticipated need to secure additional Kosher food immediately.

4. *Prayers.*

Orthodox Jews recite prayers three times a day,—in the morning, in the afternoon and in the evening. Sometimes these prayers are said in the home and sometimes in the synagogues. The total time required is approximately one and one-half hours.

B. *Concerning Customers of Crown Market who keep Kosher Households.*

Orthodox and observing Conservative Jewish customers of the Crown Market make no purchases of any kind between sundown on Friday and sundown on Saturday. Even

[fol. 43] if there were any Kosher supplies available for sale during these hours, they would not buy them. They do their cooking on Friday for the Friday evening meal and for the Saturday meals, because they do not cook on the Sabbath. They usually complete their purchases of food for the week-end by Thursday night.

Herbert B. Ehrmann, Attorney for the Plaintiffs.
Joseph H. Elcock, Jr., Attorney for the Defendant, Assistant Attorney General.

[fol. 44] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

[Title omitted]

SUPPLEMENTAL STIPULATION AS TO FACTS—
Filed November 14, 1958

The parties to the above-entitled suit hereby stipulate as follows:

The Plaintiffs, Irving Heafitz, Morris Chaitovsky and Ruth B. Cohen are Orthodox Jewish customers of the Crown Kosher Super Market in Springfield. Plaintiffs Heafitz and Chaitovsky are residents in the City of Springfield and Plaintiff Cohen a resident of Turners Falls, Massachusetts.

Herbert B. Ehrmann, Attorney for Plaintiffs.

Joseph H. Elcock, Jr., Attorney for Defendant, Assistant Attorney General.

[fol. 45]

GOULSTON & STORRS
COUNSELORS AT LAW
50 FEDERAL STREET
BOSTON 10

November 14, 1958

Clerk
U. S. District Court
Federal Building
Boston, Massachusetts

Re: Crown Kosher Super Market of Mass., Inc.

vs.

Raymond P. Gallagher
C. A. 58-471-M

Dear Sir:

I am enclosing herewith quadruplicate copies of supplemental stipulation as to facts in the above case duly signed by counsel for both parties. This paragraph is inadvertently omitted as the opening paragraph of III B beginning at the bottom of Page 4 of the stipulation filed yesterday.

Very truly yours,

Herbert B. Ehrmann

HBE:acl
Enclosures (4)

[fol. 46]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

C.A. #58-471-M

Magruder, Ch.J. and Woodbury, CJ. and McCarthy, DJ.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., et al.,

v.

RAYMOND GALLAGHER, Chief of Police of Springfield.

Transcript of Stenographic Record on Motion to Dismiss

APPEARANCES:

Herbert B. Ehrmann, Esq., Samuel L. Fein, Esq., David Kotkin, Esq., and Edward L. LaVine, Esq., for the Petitioner.

Matthew J. Ryan, Jr., Esq., for the Defendant.

Joseph H. Elcock, Jr., Assistant Attorney General, for the Commonwealth.

S. Thomas Martinelli, Esq., for Springfield.

Southern New England Conference of Seventh Day Adventists, by Howard S. Whiteside, Esq.

Archdiocesan Council of Catholic Men, by Henry Leen, Esq.

Court Room No. 5
Federal Building, Boston, Mass.
Thursday, Nov. 13, 1958; 11 a.m.

[fol. 48] COLLOQUY BETWEEN COURT AND COUNSEL

Magruder, Ch.J.: We set this case down for hearing on the motion to dismiss as well as final hearing on the allegations of the complaint. Now I don't know whether counsel have discussed among themselves the desirable order of precedence in speaking. It doesn't make any difference to me. Have you any ideas about that, Mr. Ehrmann?

Mr. Ehrmann: Well, sir, I should think we would follow the usual course, that is, that on the motion to dismiss the mover would address the Court first, and on the merits we will present a stipulation and offer some slight evidence and rest, and then I would assume, unless the Commonwealth has other evidence to offer, the Commonwealth would rest, and then counsel for the Commonwealth would address your Honors first.

Magruder, Ch.J.: Well, then, that is satisfactory to me. Will you proceed on the motion to dismiss, Mr. Elcock?

Mr. Elcock: Yes.

McCarthy, DJ.: Haven't we two parties here, the City of Springfield represented by the corporation counsel—

Mr. Elcock: Your Honor, we have an appearance in this matter on behalf of the Governor of the Commonwealth and on behalf of the Attorney-General. There is also an appearance by other counsel, Mr. Martinelli, City Solicitor, entered on behalf of the defendant. We appear because of the interest of the Commonwealth in enforcing the statutes of the Commonwealth. We appear also at the request of Mr. Gallagher, the defendant in this matter. So, if the City Solicitor is not here, I think it would not be [fol. 49] out of order for us to proceed.

Magruder, Ch.J.: Well, I think so. I think you should proceed. Will you first proceed on the motion to dismiss.

Mr. Elcock: Yes, your Honor.

Magruder, Ch.J.: All right, go ahead.

McCarthy, DJ.: May I then parenthetically clear up the record? When you say you appear for Mr. Gallagher, you appear for Mr. Gallagher in his representative capacity as Chief of Police of Springfield. Isn't that right?

Mr. Elcock: That would be so; but I have filed, your Honor, up to the present time, no appearance in that capacity.

McCarthy, DJ.: I think I see counsel for Springfield now in the back of the room.

Mr. Elcock: Are you from Springfield?

Mr. Martinelli: Yes.

Mr. Elcock: That is how I understood it.

Magruder, Ch.J.: I was just asking the Attorney General's Office to proceed with the argument on the motion to dismiss. Do you want to be heard on that, counsel for the City?

Mr. Martinelli: I don't know what has transpired, your Honor.

Magruder, Ch.J.: Well, nothing has transpired. He is getting ready to talk. We haven't said anything important.

Mr. Martinelli: May I confer with Mr. Elcock?

[fol. 50] Magruder, Ch.J.: Yes.

McCarthy, DJ.: I would like to say in open court, that the Court allowed Mr. Leen and my friend here in front to appear, each one, as amicus curiae; and I think, where you appear as amicus curiae, I don't think you should sit at counsel table with Mr. Ehrmann, any more than I think Mr. Leen should sit with the Attorney General of the Commonwealth.

Mr. Ehrmann: May I say, first, that I would certainly have no objection to distinguished counsel like Mr. Leen sitting with counsel for the defendant, and if the Court has any objection to Mr. Whiteside sitting with me, I certainly am not going to make an issue of it.

McCarthy, DJ.: He had full opportunity to file a brief, and I think, as it strikes me—I am only speaking for myself—proper procedure would certainly necessitate the opinion he shouldn't be at the bench any more than Mr. Leen should.

Mr. Ehrmann: I'll be very happy to have Mr. Leen with counsel or anybody else he wishes to.

Magruder, Ch.J.: I don't care what you do. You can sit where you please as far as I'm concerned.

McCarthy, DJ.: Mr. Leen may sit with the Attorney-

General. Isn't that right? If he cares to. Would you care to sit with the Attorney-General, Mr. Leen?

Mr. Leen: I'm very happy to sit right here where I am [fol. 51] at the present time.

Mr. Ehrmann: Let me say that Mr. Whiteside is here at my reque. My associate, unfortunately, who is with me on this case, couldn't come, and I asked Mr. Whiteside if he wouldn't sit next to me and possibly pull my coat tails when I needed it, but I certainly am not going to insist on it if your Honor objects.

McCarthy, DJ.: Don't you think you should have consulted the Court about that?

Mr. Ehrmann: Well, I'm yielding to the Court now. [To Mr. Whiteside] I think it would be best if you didn't sit here.

Mr. Whiteside: Very well [withdrawing].

Magruder, Ch.J.: Will you proceed. Have you decided what you want to do?

Mr. Elcock: Yes, your Honor. I will present the argument on the motion to dismiss.

Magruder, Ch.J.: All right, go ahead.

Mr. Elcock: And my brother, unless I omit something, will not address the Court at the present time.

The Court: All right. Go ahead.

STATEMENT BY MR. ELCOCK

Mr. Elcock: The motion to dismiss, your Honors, has been presented particularly in connection with the exercise of jurisdiction by the Federal Court. I don't think there is any contention that the Federal Court per se lacks juris- [fol. 52] diction. So we believe, your Honors, that this, although it purports to be a proceeding under the Civil Rights Act, is not technically a suit under the Civil Rights Act where they are attempting to seek damages, it is not technically an action at law in the Federal District Court: it is, however, a proceeding in the nature of an equitable remedy.

The plaintiff in this particular matter has filed a petition alleging, in effect, that certain statutes of the Commonwealth of Massachusetts regulating the observance of Sunday as the Sabbath, are unconstitutional, in that those

statutes affect the right of certain parties who have a religious belief along the lines of the orthodox Jewish faith. To that extent, your Honors, they are asking this Court in a bill in equity to restrain the Chief of Police of the City of Springfield from enforcing the provisions of that statute. They are seeking, in effect, to have the Federal District Court enjoin the prosecution of a criminal statute by a state official. Hence we would say that they are seeking, then, equitable relief; they are not seeking damages in an action at law as provided in an ordinary civil action. To that extent, your Honors, we believe that it is the fundamental policy of this Court, as it would be of any court in equity, to act only in the event that there is an inadequate remedy at law.

There have been cases, your Honors, presented to this court, where the court has declined to exercise its equitable [fol. 53] jurisdiction, on the ground that there was an adequate remedy in the State Court for purposes of protecting the rights of the petitioners, namely, the petitioners in this particular proceeding.

There is also a concept in the Federal cases to the effect that equitable jurisdiction of the court should not be exercised unless it appears there was fear of immediate and irreparable injury to the plaintiff. In other words, if there is an adequate remedy at law in the State Court it may still not be a sufficient remedy in the sense it would take too long for the State Court to act on that statute, or to decide whether it is constitutional or not—and an equity in the Federal Court should exercise its jurisdiction.

So that we would say, No. 1, there is an adequate remedy in the State Court in the sense that there is a criminal statute for breach of which the petitioner, Crown Kosher Super Market of Massachusetts, Inc., could well be prosecuted criminally, and some of the other parties in here such as the manager who signed it and people who might act; so there is an adequate remedy whereby the constitutionality may be tested.

The next step is, is there a danger of irreparable injury at the present time so that equity in this court should step in? And we would argue, your Honors, that there is no showing on this petition, or in any surrounding facts

which would be available to the Court, to indicate any such [fol. 54] irreparable injury.

And I would call the Court's attention to a decision in the Massachusetts courts and ask it to take judicial notice of it, cited in my brief—excuse me, your Honors. If someone has mislaid it. Oh, excuse me, I have it here. It is cited in my brief, your Honors, on page 1—Commonwealth v. Chernock, 1957 Advance Sheets 1051; and I will ask the Court to take judicial notice of that case as a determination of the Supreme Judicial Court of the Commonwealth of Massachusetts. And I would call that case to the attention of the Court as indicating lack of any need for immediate action on the part of this Court and lack of irreparable injury.

Woodbury, CJ.: Was there any Federal question raised in that Chernock case?

Mr. Elcock: No, your Honor, there was not.

Woodbury, CJ.: Apparently from the opinion there was not, and I wondered whether the Supreme Judicial Court just passed over the constitutional question.

Mr. Elcock: It wasn't raised.

Woodbury, CJ.: Oh, it wasn't raised at all?

Mr. Elcock: As far as I know it wasn't raised; and we would contend that the parties here had the opportunity to raise constitutionality. Our Supreme Court many times had decided Federal constitutional questions; in fact, your Honors, right under Chapter 136 as recently as a year or [fol. 55] two ago in the Chernock case, cited in my brother's brief, I have a copy of it here.

Magruder, Ch.J.: On this equitable doctrine of adequate remedy at law, it seems to me I have seen several cases that say that means an adequate remedy at law in the Federal courts, not in the State courts.

Mr. Elcock: Undoubtedly, your Honor. If the only action available to a man is an action at law in the Federal Court, then the Federal case would say they would have to look at the Federal law to see if there is any adequate remedy at law in the Federal Court; but if we are dealing with a situation where it is a state action which is involved, then we would have to look to the State Court.

Magruder, Ch.J.: Have you any authority for that?

Mr. Elcock: I would call the Court's attention to that case of Spielman Motor Co. v. Dodge, where they did discuss a State statute. That is the first case cited in our brief. I have additional ones on page 2 of the brief which deal with the general problem, and these are cited in connection with a remedy in the State Court. I would also call the Court's attention to a decision in this District Court. Now perhaps a decision by a single justice would not have any effect in connection with this 3-Judge Court, but a year or two ago, your Honors, in the case of Pictures against the Commonwealth there was dismissed on the ground that there was an adequate remedy at law in the [fol. 56] State Court for purposes of testing the validity and constitutionality of a state statute.

Now I cannot deny, your Honor, that there are Federal cases saying to look to the Federal Law to see if there is an action; but I also say there are cases where you may look at the State Law to see if there is any available remedy.

McCarthy, DJ.: What relationship does Chernock bear to the petition here?

Mr. Elcock: I was attempting, your Honor, to point that out. The petitioner Chernock in that case is the manager of the Crown Kosher Super Market. Chernock is the man who has verified this complaint. Chernock is the man who actually operates that store there, and he is one of the persons in here alleged to be the manager of these stores. So that, in effect, he would be one of the parties that would be injured as far as religious rights are concerned, if any, in connection with Crown Kosher Super Market, because the Crown Kosher Super Market obviously doesn't have a religion in and of itself, and it would be the employees, stockholders, and so forth who are alleged in the complaint. And there is a stipulation, which I don't know whether Mr. Ehrmann has introduced or not, where the facts concerning the State Court proceeding have actually been recited.

Your Honor, assuming that there is authority, as I have cited in my brief, an adequate remedy in the State Court [fol. 57] would be a ground for causing the Federal Court to refrain from exercising any jurisdiction which it may

have, I would then call the Court's attention to the fact that this matter has already been tried in the State Court, in that Chernock case to which reference has been made previously and there has been a determination; and, as has been pointed out, the question of Federal constitutionality was not there raised, but we would say there was an opportunity to raise it and a failure to do so.

Now a mere failure, your Honors, to invoke a defense which would be available to one proceeding certainly is not a ground for saying in equity you should be able to go in and attack collaterally that determination because you forgot to raise the defense that was then available to you.

Magruder, Ch.J.: Are you suggesting that the Chernock case is res adjudicata of this case?

Mr. Elcock: Absolutely, your Honor. It is res adjudicata in the sense that one of the parties here—there are several, separate states of fact as to all parties but as to the issue of— ~~No,~~ I take it back. I don't want to say this is res adjudicata in the strict sense of the word. I would say, your Honor, that there is certainly an estoppel by that case; so that any ground in equity whereby the plaintiff could claim that this court, because of irreparable injury, could restrain and enjoin, is wiped out by the fact that they had their opportunity in the State Court, they went all the way to our State Supreme Court, and any [fol. 58] equitable rights they had now in this court have gone by virtue of the fact they had an opportunity in our State Court. And they had an opportunity to go from our State Supreme Court to the United States Supreme Court on certiorari, where the question of Federal constitutionality might well have been raised.

Magruder, Ch.J.: Well, you seem to me to be making a statement that involves the concept of res adjudicata. I don't see that the plaintiff in the Chernock case is a party here, is he? Where is he mentioned in the complaint?

Mr. Elcock: Well, I call your Honor's attention to the last statement in the complaint where, "I, Harold Chernock, being duly sworn, depose and say I am President and General Manager for Crown Kosher Super Market, Inc.," and he has verified the allegations in the complaint.

I would call the Court's attention to Paragraph 6 of the petition, where it says "because of the religious convictions of the corporate plaintiff stockholders, officers and manager, because of religious convictions it is closed at sundown Friday." And I would say the corporate plaintiff, your Honor, certainly would have to incorporate, even include within it, the officers, managers, and stockholders as being the ones whose religious convictions and rights, if any, have been affected; and to the extent that no stockholder, no manager, or no officer of that corporation would be within this category of a person who would like to celebrate the Sabbath on the seventh rather than on the first day—then we would say the Crown Kosher Super [fol. 59] Market would have no standing.

McCarthy, DJ.: Let me ask you this. Are these Sabbath Day laws, so-called, nominal business statutes?

Mr. Elcock: I would say, your Honor, that they are.

McCarthy, DJ.: Well, was not the manager of this particular store that is involved here—wasn't Chernock the manager?

Mr. Elcock: Chernock, yes, sir, your Honor.

McCarthy, DJ.: And on the basis of the fact that this was the corporation, couldn't all these others that have been named in the—couldn't the Crown Kosher Super Market of Massachusetts have been named in the criminal complaint?

Mr. Elcock: Oh, certainly. No question, your Honor, that the corporation if it violated the State statutes could well be prosecuted. As a matter of fact, as I say, I don't believe Mr. Ehrmann has filed a stipulation. I had assumed when I signed it it would be available. If it is not available—

Mr. Ehrmann: Well,—

Magruder, Ch.J.: The only reason he hasn't filed it, because he hasn't gotten up yet and he asked you to speak first on the motion to dismiss which I presume may be based upon the pleadings rather than the evidence.

Mr. Ehrmann: That is right.

Mr. Elcock: Yes, your Honor; and I will restrict it to pleadings. But from the pleadings, on the face of them, [fol. 60] where Chernock has signed this petition, where

the manager is alleged to be one of the parties injured, where they purported to be bringing it in behalf of these other parties who are injured, where they claim that this is a class suit, where they purport to represent persons of this faith—I think there is no question but that the rights of Chernock would be here represented. I would also point out that in that Massachusetts case the proceeding was against Chernock also, doing business as Crown Kosher Super Market. So whether it was operating under a corporate guise or individual guise on a particular day, your Honor, would be a little bit difficult to ascertain. But for the purpose of this proceeding I would call attention to it only to point out the equities of the situation, because I am addressing the motion to dismiss, your Honors, to the equities; and, as I have indicated, if there is an adequate remedy in the State Court, ordinarily this court will decline jurisdiction, unless there is irreparable injury or undue hardship or a necessity for immediate action; and we say, your Honors, there is no such immediate necessity because of these proceedings in the State Court where Crown Kosher Super Market through its manager could have raised the point and the parties would certainly have gone to the U. S. Supreme Court to have the matter determined.

Woodbury, CJ.: What about the individual parties, the customers and all that; where do they come into your argument?

[fol. 61] Mr. Elcock: I think, your Honor, that if this matter had been determined by the State Court and could have been brought to the Supreme Court, then anybody that would be bound by it in the sense of res adjudicata would be precluded. I don't think that the particular customer of the store would be bound in the sense of res adjudicata, in that if they were subsequently prosecuted for a violation—

Woodbury, CJ.: Could you prosecute them? Is it illegal under Massachusetts law for a buyer to buy?

Mr. Elcock: Well, I would assume it is illegal to enter into a contract on Sunday, your Honor. If there is a purchase and sale agreement it might well be a contract.

Woodbury, CJ.: It might vitiate the contract but is it a criminal offense?

Mr. Elcock: Anyone who carries on labor or business on the Lord's Day would be violating Section 5.

Magruder, Ch.J.: Read the statute to me. Where is it? The statute we are interested in.

Woodbury, C.J.: It says something about keeping open a shop, something like that.

Magruder, Ch.J.: Where is the statute?

Mr. Elcock: 136, Section 5, your Honor, reads as follows:

> "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, [fol. 62] business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars."

Mr. Ehrmann: I suggest that counsel read the first line of the next paragraph.

Mr. Elcock: Unless I am mistaken, I will tell Mr. Ehrmann there is no first line of the next paragraph.

Mr. Ehrmann: I have it here.

Magruder, Ch.J.: Does the complaint set forth the statute you are attacking? I must have it here somewhere.

McCarthy, DJ.: I think it does.

Mr. Elcock: It is the next section.

[Counsel confer.]

Mr. Ehrmann: You have read—

McCarthy, DJ.: Not now, Mr. Ehrmann. I think you ought to be heard later on.

Mr. Ehrmann: Well, I spoke in order that there be no confusion. You've got a later section, and there is another sentence.

McCarthy, DJ.: Is there another sentence?

Mr. Elcock: No, your Honor. In another section of the law there may be other clauses, but the whole of Section 5 is a single sentence which I just read to you.

Mr. Ehrmann: All right.

Magruder, Ch.J.: Section 6 is incorporated in Exhibit [fol. 63] A of the complaint, I think.

Mr. Elcock: Yes, your Honor. There are many exceptions. I will digress for just a moment from the equities and perhaps mention the substance of the statute in order

to show the rights of the parties and the possible equities that may flow therefrom. And we could find out, your Honor, in that connection, that there are many exceptions to the blank prohibition set up in Section 5, some of which have been argued in the brief and many have not.

Section 6 allows the opening of certain shops; the selling of certain foods as may be necessary and the selling of drugs; the publishing of newspapers. It contains many, many exceptions to the general rule. And in this particular case, your Honors, there is also a specific exception on behalf of the persons who are of the persuasion of the Orthodox Jewish religion, in the sense that they may actually open their stores on Sundays between the hours of 6 in the morning and 10 for the purpose of selling Kosher meats. There is also an exception, your Honors, a fairly broad one—

> "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, [fol. 64] if he disturbs no other person thereby."

To that extent, your Honors, we must say that if someone is able to bring the stuff within those exceptions such as one of these other persons of the—

Magruder, Ch.J.: Well, are you suggesting these complainants have not violated the statute?

Mr. Elcock: Oh, I am not, in any sense.

Magruder, Ch.J.: What is the use of talking about the exceptions, then?

Mr. Elcock: Well, they have—

Magruder, Ch.J.: If they are not within the exceptions?

Mr. Elcock: Some are and some are not. I believe I was asked whether some of the other plaintiffs who might be customers could possibly be prosecuted, and I said, under 5, yes, unless they came within the exceptions.

Magruder, Ch.J.: The chief complainant, the corporation, the Crown Kosher Super Market, Inc., that is in violation of the statute, you say?

Mr. Elcock: Yes, and for this reason, your Honor. What they did is, open up a store to sell not only kosher meats

but all sorts of grocery products, and they opened up on Sunday, not only between the hours of 6 and 10, but any other hours they wanted. And here is the difficulty. They conducted their shop, not in connection with those who [fol. 65] conscientiously observe the seventh day, but they sold to anybody who wanted to walk in the door. They were open to the general public. They carried on and made contracts with members of the general public, many of whom would have had no such protection as the statute purports to give here—to the extent that if the Crown Kosher Super Market had observed the provisions of Section 6, your Honor, they had a perfect right to stay open under this statute. The trouble is, they went way beyond the exception which was given to them.

I think, your Honor, that is perhaps getting into the argument of the constitutionality of the statute, whereas at the moment what I was attempting to do was to show that there was no inequity on these plaintiffs; and I would say now—

Magruder, Ch.J.: Well, one of the grounds of your motion is, that on the face of the complaint it does not appear the complainant's liberty or property has been interfered with.

Mr. Elcock: Well, I have more than one argument.

Magruder, Ch.J.: That is an assertion in your present motion to dismiss that gets you into the constitutionality argument, I suppose.

Mr. Elcock: Well, there is no doubt of that, your Honor. I was raising the point on equity, and I was also raising the point, that on the face of the complaint it would appear the statute is not unconstitutional; and, perhaps in the interest of proceeding with the argument as the Court might desire, I will address myself more specifically to that [fol. 66] ground of the motion to dismiss, namely, that on the face of the complaint the statute is not unconstitutional.

Assuming, your Honors, for the purpose of the argument that the equities of the situation would demand that this Court step in and exercise its jurisdiction, we would then have to go to the second point. Is there a statute called to the Court's attention which would be unconstitutional

in respect to the rights of the particular plaintiffs who are here complaining?

The statute, your Honors, is, as I have read, prohibitive of activities on the Lord's Day. The Lord's Day has been interpreted to be Sunday. And it prohibits all sorts of business and trade on that day, and then has various exceptions in Section 6. And we would call attention, your Honors, to a case cited in the brief, a Massachusetts decision, which has been cited not only by myself in the brief but by Mr. Ehrmann. That is the case of *Commonwealth* v. *Has*, 122 Mass. 40, cited on page 2 of our brief. In that case, your Honors, there was a discussion by the Massachusetts Supreme Court of the nature of the law as it prohibits activities on Sunday; and it was the opinion of the Supreme Court of Massachusetts, that the statute was one designed to provide for civil regulation of one day in the week whereby people should refrain from work on that particular day. There was a violation of that particular statute where a man purported to open up his shop [fol. 67] and sell for all purposes, such as the Crown Kosher Super Market did in this particular case. They didn't purport to limit their sales; they had a general shop opened up where they sold all kinds of products to all persons who would come there. And the Court under that case reached the conclusion that the statute was constitutional; and they based it on the ground that it was within the police powers of the Commonwealth to have a statute passed which would set aside a day in the week for purposes of requiring rest from work. It also, of course, would have the result of allowing people to carry on such activities on the Lord's Day as they would desire—to the extent that they would be able to go to church, that they would be able to stay at home if they desired, that they would be able to be with their families—that they would, in effect, stay away from work as such and carry on the other activities of life which would lead to a richer enjoyment of life here on earth. In that sense a Sunday law has been recognized in Massachusetts on that basis.

Now, as I understand the petition, the claim of the petitioners, they assert, in effect, that this statute is directed

only to the regulation of religion; and they would point out that if a statute purports to regulate religion, then it violates the rights of various individuals because no statute, Federal or State, could be enacted under the Federal Constitution which would have for its purpose the regulation of the promotion of religion.

[fol. 68] With that I cannot disagree. You cannot set up one statute regulating the Christian faith or regulating the Jewish faith or regulating whatever other denomination may be in existence. On the other hand, the mere fact that a day is set aside where business is prohibited does not, in my estimation, have anything to do with the regulation of how this religion or that religion or the other religion is carried on. There is no prohibition in the statute which relates to religious observances. The religious observances of all sorts may be carried on on Sundays. And, in connection with them, there are exceptions in the statute whereby, if it is not business but it has to do with religion or recreation or something of that sort, they allow all sorts of exceptions. You may have bands and things of that sort, you may do all kinds of things which are not particularly of a business nature, but would help to promote the general welfare, and one way to promote the general welfare is to promote an atmosphere where religion may thrive or, if a person doesn't desire to participate in religion, where they would be free to do as they pleased.

It is our contention, your Honors, that this statute does not purport to regulate either the Christian religion or the Jewish religion or any other. As the petition itself points out, the religious observance of the particular parties is something of extreme importance to them and rightly so. It points out that many of their activities of a re-[fol. 69] ligious nature take place on Saturday; and I cannot see any clause whatsoever in the Massachusetts statutes that would affect in any way the rights of these particular parties to carry on their religious activities on Saturday, nor is there any prohibition to their carrying on religious activities on Sunday. To that extent, your Honors, this is not a statute directed at the control of religion, nor is it a statute which would force any group to

participate in religious observances of any kind. To that extent I believe that any attack on it from a religious point of view, that it is a regulation of religion, is not a proper attack.

This problem has been to the Supreme Court, your Honors, certainly not in a factual matter very close to what we have here. My brother in his brief has pointed out a situation which was fairly close but was not actually decided by the Supreme Court because it went out on a motion to dismiss. So I think, in all fairness, perhaps there is nothing precisely on the point in connection with this observance of Saturday.

However, your Honors, I would call attention to a case cited in my brief, also cited in the brief of Mr. Ehrmann, the case of *Hennington* v. *Georgia*, appearing on page 3. That case, your Honors, was one relating to a Georgia statute which prohibited the operation of freight trains on Sunday. Now, obviously the prohibition of the operation of freight trains on Sunday would inconvenience persons, [fol. 70] it would inconvenience many people; it would also interfere with certain Federal rights—it would interfere with interstate commerce. In spite of that the United States Supreme Court said that it was within the police powers of the State of Georgia to enact a statute prohibiting all activities on Sunday.

Now I grant you, your Honors, that that is not a case having to do with religion but it is quite clearly a case where the power of a State Court under the police powers to set aside one day whereby no business may take place, even though it would interfere with Federal rights,—it is certainly a case which decided that proposition. To that extent, your Honors—

Magruder, Ch.J.: What case is that you refer to? What case are you referring to?

Mr. Elcock: *Hennington* v. *Georgia*, 163—

Magruder, Ch.J.: Is that on your brief?

Mr. Elcock: Page 3, your Honor.

My brother cited it on his brief and says it doesn't need any explanation. Well, I agree. I don't think it is a question of religion. It is a question whether a State can properly exercise its police power.

Now that carries one further point. Assuming—

Magruder, Ch.J.: If you take thi statute as a whole, I don't understand the theory of some of these so-called exceptions. Why should there be an exception to the sale of ice cream, for instance, or gasoline?

Mr. Elcock: Well, I can't purport, your Honor, to tell [fol. 71] you why there should be that exception.

Magruder, Ch.J.: Or the transportation of livestock be permitted?

Mr. Elcock: I can certainly suggest that since it is a regulation of—

Magruder, Ch.J.: Or the sale of wholesale dressed poultry?

Mr. Elcock: Well, there must be some reasonable exceptions, and I would say the General Court has determined that facts have been presented in connection with those products which would indicate they should have exceptions.

Magruder, Ch.J.: The making and selling by bakers of bread?

Mr. Elcock: Yes, your Honor. And the selling of kosher meats on Sundays between the hours of 6 and 10 a.m.—that is specifically put in the statute.

Magruder, Ch.J.: Are these exceptions all exceptions made by the General Court of Massachusetts?

Mr. Elcock: Yes, your Honor. They are all made by the General Court. They are continued in Section 6 of Chapter 136. They are amended from time to time as the needs of the community would dictate.

Magruder, Ch.J.: Nor shall it prohibit the sale of fruits and vegetables by the person who raises the same. If the sale of fruits and vegetables is okay, why did they limit it to the person who raised the same?

[fol. 72] Mr. Elcock: Well, let's say, your Honor, you are calling attention to the fact that this is not a religious statute in that sense at all.

Magruder, Ch.J.: Well, they keep talking about the Lord's Day. That sounds, has a religious flavor.

Mr. Elcock: I think the history of the statute would clearly indicate that it had a religious origin. Certainly, when the Pilgrim ancestors enacted that statute they had

in mind then a community dictated by a religion, because there was a state religion, if you will, and to the extent that you would look at the history of the statute you can't ignore it, and if we push the history far enough back, your Honor, back into English common law, there was observance of the Sabbath, and back in the time of Christ there was observance of the Sabbath. Prior to the time of Christ, during Bible times, there was observance of the Sabbath; and in Genesis itself, your Honor, there is an indication that one day is set aside for rest. So that—

Magruder, Ch.J.: The statute merely says, "Whoever on the Lord's Day," etc. Who determines what is the Lord's Day?

Mr. Elcock: It has been determined by the Massachusetts cases, that the Lord's Day refers in Massachusetts to Sunday, the first day of the week. That was a determination made, your Honor, many years ago.

[fol. 73] I believe, your Honors, that when some of these statutes were enacted it was not necessary, perhaps, to spell out in detail what was meant by the Lord's Day, because everybody in the community at that time would have had no doubt whatsoever what was meant by it. It would be like saying, in Massachusetts the crime of murder is punished in such a way but the crime of murder is never defined. You may look to the common law to determine what is meant by murder. Likewise, your Honors, the Lord's Day was obviously Sunday as far as our common law tradition is concerned, and the use of the Lord's Day in our statutes would clearly imply the interpretation of that word that had been given to it by the courts, not only of America, but of England, from whence we derive our judicial system. To that extent, although the word Lord's Day is there, it is referring to one particular day of the week, and I cannot deny, and do not desire to deny, your Honors, that there might initially have been a religious basis for a statute of this sort. Obviously, prior to the Declaration of Independence and the setting up of a system as we know it here in America, there were religions. And people had been banished from the Commonwealth because of failure to observe those religions. Now that has all been changed, your Honors, by virtue of our Constitution where there

may be no statute that regulates religion, and to the extent that there were any such statutes, they have long since [fol. 74] been made to give way to a current understanding of the people who live in America and enjoy it. However, where a statute has been on the books for a good many years and happens to use the word Lord's Day, the mere fact that it refers to the Lord's Day I do not think would in and of itself make it invalid.

I would go one step further.

McCarthy, DJ.: Does the Lord's Day refer to the religion of the Orthodox Jews, as well?

Mr. Elcock: I suppose it could have been interpreted as meaning the seventh day of the week. If it did, then we would have another group that might want to celebrate Sunday and they would be in here contending that some other day should be taken.

McCarthy, DJ.: Aren't there a number of cases which say that the first day of the week was chosen because it represented the day of the week on which a great majority of the people that care to go to church did go to church?

Mr. Elcock: At that time, your Honor, it perhaps was deemed best in the interest of the community that the day set aside should be the day when people would not be working anyway. To the extent that one such day was set aside even at that time, however, I think there would have been some inconvenience to persons then who would not have celebrated, would not have carried on their religions on Sunday.

McCarthy, DJ.: Are there any days outside of the first [fol. 75] day of the week that are represented as the Lord's Day in any other States of the Union?

Mr. Elcock: I am unfamiliar with that, your Honor.

I will go back once again to the general allegation that this statute is an exercise of the police powers and has been determined by the United States Supreme Court to be a valid exercise. I would add a further complication. Any exercise of the police powers would obviously have to be a reasonable one. But, also, any exercise of the police powers may well be one which would cause some injury which would have to be recognized by a sovereign who is purporting to exercise such police powers. If no one were

injured thereby, everybody desired it, you probably wouldn't actually need any police power as such. The mere fact that you have a right to compel in one sense would indicate that there is a hardship or a difficulty which would be imposed on individuals. Now, whatever day might have been fixed by the Commonwealth of Massachusetts or any other state for the purposes of setting aside as a day of rest, would certainly cause inconvenience to some people. Some people might desire to observe no religious customs at all. They might desire to operate their business on certain days of the week and thereby derive a greater profit than otherwise. To the extent that persons having no religious persuasion are prohibited from opening their store on Sunday, they certainly suffer an inconvenience; and yet, an inconvenience which is suffered by [fol. 76] some members of the general public is recognized under the police power if the general good is promoted.

So we would say, your Honors, there is some inconvenience, possibly. The General Court has attempted to circumvent some of these inconveniences by spelling out these exceptions to the statute. Whether the exceptions are broad enough is something I think is for the General Court to decide rather than to say that the whole statute is unconstitutional.

In connection with the particular petitioners in this matter, I would call the attention of the Court to the fact that they may be open on the Lord's Day for the purpose of selling kosher meats between the hours of 6 and 10. Now they contend, I suppose, that it is inconvenient for them to have to shop during those limited hours; but no one else is allowed to open up for the sale of meat at that time. It is a special exception in favor of these people in order to enable them to carry out their religious ceremonies in a little more convenient manner.

Now opening on Sunday, as I understand it, wouldn't have anything to do with the conduct of their religion. It is that they are prohibited on Saturdays from making purchases, and therefore they would like an opportunity on Sunday at least to be able to acquire some additional meat or something of that sort, and to that extent the General Court has put in the exemption. And they have

gone further, as I pointed out before. As far as the exer-
[fol. 77] cise of police power, it is more than fair and equitable in these circumstances because of the clause of the statute prohibiting the performing of any secular work on the Lord's Day by any person who conscientiously believes the seventh day of the week ought to be established, and actually refrains and so forth from labor on that day if it disturbs no other person.

I would say, your Honors, that to the extent they opened up to sell a particular piece of kosher food to persons unable to buy it on Saturday and where the customers themselves have refrained from opening their places of business, it may well be there is an exception on behalf of the Crown Kosher Super Market. But to say they are allowed to open up a shop in toto and sell all kinds of goods and to sell them to the general public, is an interpretation of the statute which is a strange one. It is strange as indicated by our Supreme Court in that particular case of *Commonwealth* v. *Has*. You cannot just open up a store and throw all limitations out.

Now, your Honors, it may well be, in connection with this constitutional question, that as a result of a stipulation which Mr. Ehrmann may put in and as a result of evidence which may be introduced, that further matters which would not be open to me on a motion to dismiss should be heard. Subject to further argument on that line, I would close my argument on the motion to dismiss noting these points:

[fol. 78] (1) That although this Court has jurisdiction in equity, it should not exercise it if there is an adequate remedy in the State Court; and we say there is not only an adequate remedy here because some if not all of these parties could be prosecuted, and some have been in the sense of the manager of the store; and

(2) There is no immediate hardship. This prosecution took place in 1957. They have had an adequate time to do something about it, they have done nothing about it, and just because they come rushing in here now claiming immediate injury, I think is asking the Court to go a long way in exercising its jurisdiction in connection with a matter which should be determined, first, in the State Court and then, if there is any dispute, it should go in the ordi-

nary course to the United States Supreme Court under certiorari. And our second ground, your Honor, apart from the fact that the Court should not exercise jurisdiction, is that the statute on its face is an exercise of the police power, it is a reasonable exercise because it grants many exceptions and grants specific exceptions on behalf of the petitioners in this particular proceeding. And for these reasons, your Honor, we would urge the matter be dismissed.

Magruder, Ch.J.: Thank you, Mr. Elcock.
Mr. Ehrmann?

STATEMENT BY MR. EHRMANN

Mr. Ehrmann: May it please the Court, this is rather [fol. 79] a late hour in the history of our jurisprudence to question whether basic constitutional rights may not be tested in the District Court by a 3-Judge Court. I think perhaps the classic statement of the situation was in the celebrated Oregon school case—Sisters of the Holy Names of Jesus and Mary v. Pierce, Governor of Oregon. You may recall that Oregon passed a statute to compel all parents to send their children to public schools. It was aimed chiefly at parochial schools. The plaintiff brought suit in a 3-Judge Court, and all of these objections that you have just heard were raised. They were covered, perhaps for all time, in that case. But I will indicate that there have been recent cases involving the same principle. It is so well stated that I hope the Court will forgive me—

Magruder, Ch.J.: What are the constitutional provisions in the Federal Constitution that you invoke in this case?

Mr. Ehrmann: In this case?

Magruder, Ch.J.: Yes.

Mr. Ehrmann: In the instant case?

Magruder, Ch.J.: Yes.

Mr. Ehrmann: The First Amendment, the prohibition against—

Magruder, Ch.J.: The First Amendment—

Mr. Ehrmann: —against a law—

[fol. 80] Magruder, Ch.J.: The first amendment is not binding on the State of Massachusetts, is it?

Mr. Ehrmann: Yes. The rights and liberties under the First Amendment have now been ruled to be included under the Fourteenth Amendment; so that the Fourteenth Amendment now comprises, so far as its prohibition of State statutes is concerned, the constitutional rights under the First Amendment.

Magruder, Ch.J.: You mean, about the establishment of religion?

Mr. Ehrmann: Establishment of religion, freedom of religion, freedom of the press, all those rights.

Magruder, Ch.J.: Well, I don't know what freedom of the press has got to do with this case.

Mr. Ehrmann: Well, no, it hasn't.

Magruder, Ch.J.: What is there about establishment of religion in this statute?

Mr. Ehrmann: Well, if your Honor pleases, it is getting a little bit ahead of my presentation. Whether this is a law tending toward the establishment of religion depends upon the primary question as to whether or not this statute, Chapter 136, sets apart Sunday as a religious Sabbath. If it does that—and I believe that a careful consideration of the statute and its history indicates it does nothing else but that—then using the criminal machinery of the State to enforce the Sabbath of another faith is obviously a law looking toward the establishment of religion under the threat of a subvention of a thousand [fol. 81] dollars, because it is utilizing the prosecuting machinery of the State to enforce people to give up their liberties on the Sabbath of some other faith.

McCarthy, DJ.: Well, what freedom do they give up? They can go to the synagogue, can't they?

Mr. Ehrmann: They can go to the synagogue on Sunday. That is exactly—your Honor has asked the question which is basic to this whole problem.

McCarthy, DJ.: Many of the Jewish synagogues are open on Sunday, aren't they?

Mr. Ehrmann: They are open every day of the week, if your Honor please.

McCarthy, DJ.: I mean, open for services.

Mr. Ehrmann: Well, they have certain limited services every day of the week. While it does not appear in the

bill, the services are very extensive on Friday night and on Saturday.

McCarthy, DJ.: I mean, those of the Reform Synagogues. Don't misunderstand me. They have Sunday School classes on Sundays.

Mr. Ehrmann: Many of the Reform congregations—

McCarthy, DJ.: All of them do; isn't that right?

Mr. Ehrmann: Well, they have them on other days of the week also.

McCarthy, DJ.: That's right.

[fol. 82] Mr. Ehrmann: But as far as the Orthodox Jew which is here represented, they have religious classes every day in the week other than Saturday. So I thought your Honor's question really proves this whole thing when you asked why don't they go to the synogague on Sunday?

McCarthy, DJ.: Are you relying on the Oregon case as the one case which distinguishes, which is the guiding star for our decision, the decision of this court?

Mr. Ehrmann: Oh, no, your Honor, please. I cited a dozen or fifteen cases on our brief. I was merely starting to answer Mr. Elcock's preliminary argument, that this Court should not entertain the bill, that's all. I just got started on that. As to whether or not the Court should dispose of the question here or send it back to the State Court—

McCarthy, DJ.: Now, concerning religious liberty under the First Amendment to the Constitution, how does this section at all interfere with the exercise of religion by the Jewish people? It doesn't compel them to go to any religious observance or have any religious observance to attend, or any religious service, does it?

Mr. Ehrmann: That is quite right.

McCarthy, DJ.: It doesn't interfere with their religious observation of whatever religious holidays they may wish to follow, does it?

Mr. Ehrmann: That is correct. But it places a very, very heavy penalty upon them if they don't.

[fol. 83] McCarthy, DJ.: What kind of a penalty?

Mr. Ehrmann: Well, I started to explain it a little while ago as I see it, but I may be mistaken. We have here a community in Massachusetts of very pious religious people.

They observe Saturday strictly. It is rather ironical that they should be here put in the position of challenging what is called the Lord's Day. They are a very pious religious people. They don't do anything on Saturday—or Friday night. The ritual with respect to food is quite complex. It isn't that they just don't eat pork and have to have meat which is slaughtered in a certain way. It is very complex, and they try to live by it. The ordinary pressures for them to give up their faith or the expression of it, living in a society such as we have, are enormous. Along comes the Commonwealth of Massachusetts and then adds a criminal penalty if they do anything on Sunday; and I suggest to this Court as strongly as I can, that to pressure people to give up their faith by making their business suffer a great loss, as the Crown Kosher Super Market would if it had to close on Saturday and Sunday also, and render it inconvenient and difficult to observe their duties if they want to buy food on Sunday that is ritualistically proper—that there has been added a terrific pressure, backed by the criminal machinery of Massachusetts, to observe some other day than their Sabbath.

Now that has been covered in the Everson case, I think. [fol. 84] That is the case, your Honor will remember, in which the question was raised as to whether the State could pay fares on school buses to take children to private and parochial schools as well as the public schools, and the Supreme Court held it was proper as a matter of safety. But the Court then went on to make a classic distinction of what the establishment of religion meant, and that statement clearly comprises what we are faced with today. The statement is quoted on my brief. This is from the Everson case. For the record, this is Everson v. Board of Education, 330 U.S. 1. And this is the most quoted definition:

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . "

This is also dealing with a State statute:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one

religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious [fol. 85] activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of a religion by law was intended to erect 'a wall of separation between Church and State'."

Later on, in the McCollum case that was designated as "a specious conception", with a "secular reach far more penetrating in the conduct of government than merely to forbid an established church."

McCarthy, DJ.: Isn't the gist of your complaint here that the religious liberties granted under the First Amendment of the Constitution should be extended so as to protect the business interests of those who are in a minority, that is, so far as observance of Sunday as the Lord's Day is concerned?

Mr. Ehrmann: We think it already exists. The First Amendment is quite adequate to cover that situation as it is now.

McCarthy, DJ.: You are familiar with the Jacobson case, aren't you, 197 U.S. 11? Let me ask you this?

Mr. Ehrmann: Yes.

[fol. 86] McCarthy, DJ.: Isn't it true that the religious convictions—

Mr. Ehrmann: That was the vaccination case.

McCarthy, DJ.: That is correct.

Mr. Ehrmann: Yes.

McCarthy, DJ.: Wait a minute. Isn't it true that the religious convictions involved in this case be subject to

some sensible limitation in the same manner as they were established in that case, that is, subject to limitation by reasonable exercise of the police powers? Because, if you don't do that, you will have no day set aside for a day of rest or a day when a person can have an opportunity to exercise his religion. Obviously he would have to work, and obviously Sunday was fixed because it represented, didn't it, the majority of people that might care to go to church, with no reflection upon the good Jewish people or the Seventh Day Adventists.

Mr. Ehrmann: Your Honor, it seems to me, has stated correctly the principles; but the problem we are confronted with now is, whether there is justification for the exercise or the intrusion of this police power into the affairs of the Crown Kosher Super Market, Inc.

McCarthy, D.J.: How are you going to have a test of the exercise of the police power unless you recognize the conditions that apply to it?

Mr. Ehrmann: That is exactly what we have attempted [fol. 87] to do on our brief. As my brother has correctly stated, the burden of this statute was in a puritanical day, and it was one of the early Blue Laws, and there was no question about it but that it was religious in its conception, and those religious preambles have been approved as recently as a few years ago by the Massachusetts Supreme Court.

There isn't one thing in that statute, if your Honor please, or one expression of the Legislature, that that is anything else than primarily a religious statute establishing a religious holiday. Even the exceptions hitch around it. For instance, the firemen may parade, but they have got to stop the music within 200 feet of a house of worship on Sunday. There may be other parades, but they must stop the music within 200 feet of a house of worship. Baseball games may be played on Sunday, but not within a thousand feet of a house of worship. On any other day they can, even in front of a synagogue on Saturday they can blare all the music they want to but not on Sunday.

Now every one of these exceptions that permit the sale of merchandise, practically every one, is hitched around with hours. A bootblack may do it before 11 o'clock. Base-

ball, football, hockey may be played in the afternoon, not the morning. Bread may be sold before 10 and after 4:30 in the afternoon. Even the exceptions indicate that the purpose of this Act, or these exceptions, was to protect the church worship of those people who went to church on Sunday.

[fol. 88] Now how did they get to be established in one day of rest on Sunday? I submit to this Court it never got there. It was made up by the Massachusetts Supreme Court in *Commonwealth* v. *Has*, that my brother has quoted. Without any statement as to evidence, without any analysis of the statute—so far as I know this statute has never been analyzed by the Supreme Court of Massachusetts. So long as the defendant who was prosecuted under this statute did not raise the question of his own religion, that he observed the Sabbath, they always said it was a religious day. That was the purpose of it. We know there is a saying that the Puritans came to this country to worship God in their own way and force everybody else to do the same; and this statute represented that original concept, and there has been nothing that has happened since to indicate that it is supposed to set up one day a week as a day of rest and that day Sunday. The fact is, the evidence indicates quite the contrary, because everyone—

Magruder, Ch.J.: If we knocked out this statute as you request, would the Legislature be within its rights to re-enact some such provision as you just said that doesn't talk about the Lord's Day but talks about one day of rest in seven?

Mr. Ehrmann: We already have a statute directed to employers to give their employees one day off in seven. It doesn't specify any day but they must give 24 hours, a day's rest in seven. That is Chapter 129, I think, of the General Laws.

[fol. 89] McCarthy, DJ.: Don't you think, in the light of the history of the statutes—I have done a little work on it—which I find applies to every State in the Union, I haven't seen a state that doesn't have it,—don't they have in mind freedom of religious worship in the sense that people shouldn't be, and I hope it will never be, they

never should be obliged, to go to church if they don't care to on Sunday; but doesn't it concern the moral training of youngsters who can have the consolation of their father's presence and the opportunity for the father to spend some time with his children because he is working the other days of the week? Saturday he has to do his shopping; Sunday he has a chance, if he cares to, to go to his church or his synagogue, or take his youngsters out, and he learns to know them, they learn to understand him, the mother and father, and these youngsters get together with them and they form a society which is the kind of society that will help preserve our imperishable values. Don't you think that the wise men that framed these laws had that in mind? Don't you think the men that gave us this country for ours—

Mr. Ehrmann: Well, maybe—

McCarthy, DJ.: —were wonderful men—that came over here from persecuted lands and obviously set up a government such as we have, set up a law a hundred years before the union of the nation, the union of the Thirteen States and of the United States. Don't you think they had that in mind, too?

[fol. 99] Mr. Ehrmann: I don't know—

McCarthy, DJ.: They couldn't satisfy everybody trying to fix a day; and so well was that fixed, Mr. Ehrmann, that you can't make a contract on Sunday. You know that as a lawyer.

Mr. Ehrmann: That's right.

Well, now, if your Honor please, you have asked me really two questions: one, whether I thought the Founding Fathers had that in mind.

McCarthy, DJ.: I didn't like what you said about the family or the founders or the public, and that's why I said it. I don't agree with you.

Mr. Ehrmann: The second question which your Honor asked me was, Don't I think it's a good thing for the families to be together one day a week? I don't believe that my opinion is of any weight, but we are now representing a group of people whose reputation, I think, for fine family life is understood by everybody.

McCarthy, DJ.: I said,—

Mr. Ehrmann: And Friday nights and Saturdays are the days on which their families get together.

McCarthy, DJ.: I said, don't you think that our Founding Fathers had that in mind when they established these statutes which you refer to as puritanical? Don't you think they had that in mind?

[fol. 91] Mr. Ehrmann: I do not know what they had in mind. I think the object that your Honor stated is salutary. I can say I do not think they had that in mind if I look at the words they used. Their preamble read something like this:

> "Whereas, it is the duty of all persons, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons: therefore, . . ."

then it is enacted. And the decisions of Massachusetts are full of cases approving those preambles. Some of them even mention,—for instance, in the preamble referred to in *Commonwealth* v. *Dexter*, it says, that the day is set apart among other things "for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society." And it goes on:

> "Whereas, some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society: to the great disturbance of well-disposed persons, and [fol. 92] to the great damage of the community by producing dissipation of manners and immoralities of life: therefore, be it enacted . . ."

So, I would reply to your Honor that I do not know what was in the minds of those who wrote it, other than

what they said. I agree with your Honor that it is most salutary there should be a day on which families get together so that they may enjoy the exhilaration and benefits of family life. But the group that are here in court today are exemplary on that very thing, and they do, on Friday nights and Saturdays they do get together, but they are being coerced to drop that and to do it on another day, which is not their Sabbath.

I do not know whether I have answered to your Honor's satisfaction or not.

McCarthy, DJ.: Do you realize that the signers of the Declaration of Independence were Jews, Protestants and Catholics? Do you realize that?

Mr. Ehrmann: I do. I realize that every statute merely because of its age is not entitled for that reason alone to great respect. For instance, it took nearly a century to get rid of the disabilities of Catholics and Jews for citizenship in many of the original Thirteen States; and in Judge Woodbury's state it wasn't until 1878 that that disability was removed.

Woodbury, CJ.: For holding office.

Mr. Ehrmann: For holding office, that is right. That is [fol. 93] correct.

McCarthy, DJ.: Well, take for example, Mr. Ehrmann, talking about religion, this applies to the Seventh Day Adventists. Isn't it proper for the Judaeo-Christian religion to recognize and give full faith and value to the others? If you are going to believe in the Christian religion you've got to take as its foundations the revelations that were given by God to Jewish philosophers who were very holy men. Isn't that true?

Mr. Ehrmann: That is true. And I want to say to your Honor that just a year ago last summer I stood on the shores of Lake Galilee in front of the Mount where Jesus delivered the most eloquent sermon in history; and in that entire sermon he stated what is the basis of what your Honor has just called the Judaeo-Christian religion, and he said,—

McCarthy, DJ.: Within the shadow of that is the State of Israel. Isn't that so?

Mr. Ehrmann: Yes. And what he said was this:

"Do unto others that which you would have them do unto you. That is the law and the prophets."

And about 25 years before that the great Rabbi Hillel, one of the great Jewish rabbis, was asked by a scholar what was the Jewish religion, and he said, "Tell it to me while I stand on one foot." Rabbi Hillel said: "Do not do unto others that which you would not have them do unto you. That is the law. All the rest is commentary."

[fol. 94] So I feel that the First and the Fourteenth Amendments are there to translate into the basic law of our country the concept, that just because you have a majority you don't take advantage of or you don't push a minority; and the way we live together in a democracy is, we all have to respect one another.

Now I respect these Orthodox Jews and their dietary laws, strict observance of the Sabbath, the people who eat fish on Friday, and all the other faith indicia. And it is good for our country, it seems to me, that there should be this variety. It enriches our culture and it adds to alertness in the life of our nation. But when a group takes those particular things rather than the basic thing I just mentioned and tries to impose them on somebody else, that is when the trouble happens, and that is what our Supreme Court has been wrestling with for the past ten or fifteen years.

Those cases that are bracketed under *Brown* v. *Topeka*, the segregation cases, deal with the same issue which is before you today. The people in the South passed statutes treating the colored people differently from the white people; and I think that we should be very, very grateful, and thank God, that the Supreme Court is breathing the breath of life into those First and Fourteenth Amendments and making them live in a democracy. And therefore I feel that these particular things, the way that we express it—it isn't important in the life of our democracy whether Saturday is observed, or Sunday is observed, or [fol. 95] whether kosher is eaten, or whatever else is done; but the thing that is important in the life of our democracy is how we live together—we don't abuse each other, we re-

spect each other. And here we are, here are the great faiths of America, all unite on a platform that we don't behave like that; and we have the great constitutional amendments that tell us that we don't behave like that. We don't pass laws oppressing a minority merely because we have the votes.

There was a referendum in California just last week to revoke the tax exemption of private and parochial schools. Now, when I read this, I felt that was another example of a majority trying to take advantage of a minority. Fortunately, it was defeated. But there is a law on which all of us can agree, namely, those laws that are incorporated in the First Amendment and in the Fourteenth Amendment, which prevent people, simply because they are a majority, from putting their views over on a minority, their particular religious views or particular racial views, or their views as to nationality. Now, I think we got, or I got at least—I didn't intend to talk like this but your Honor inspired me to do it—I was discussing the cases that my brother had brought as a reason why this Court should not consider the bill that has been presented.

Woodbury, CJ.: We are back now on the Pierce case, I take it?

Mr. Ehrmann: Yes, back on the Pierce case.

[fol. 96] Woodbury, CJ.: Now there's one point in that Pierce case that I thought might distinguish it from this one. In that case, if the Oregon law was good, the value of property devoted to school purposes would be destroyed, or practically so, I take it?

Mr. Ehrmann: Yes.

Woodbury, CJ.: That is not true of this situation, the case at bar, is it?

Mr. Ehrmann: In this case there is an allegation of great damage.

Woodbury, CJ.: Yes; but it is not destruction, it is not serious damage, is it?

Mr. Ehrmann: Well, it is a loss of at least a third of the business of the entire week. How much of that could be made up is a question, perhaps, of evidence; but the allegation there would be this very great damage. You will see that this store would be open practically only five days a week. I don't think that 6 to 10 provision is at all prac-

ticable. You can't have employees come at 6 o'clock in the morning and pay them for an entire day just for working between 6, 8 and 10 and nobody shows up until 8 or 9, and the rabbi could not perform his functions without getting up before dawn. I think, with all the best intentions in the world, that our Legislature just simply didn't understand what they were doing.

Woodbury, CJ.: Well, it would rather stretch the practicability if a third of the week's business is done on Sun- [fol. 97] day. Do we have to take that allegation of the complaint as true for purposes of this hearing? I suppose we do.

Mr. Ehrmann: Your Honor, it is alleged in the bill, and I suppose on a motion to dismiss it is taken as true, but I have brought Mr. Chernock here who has his books of entry in which he shows that more than 33⅓ per cent of the business is done on Sunday; so that, while we have to take the allegation as true, we have the proof here if it becomes material.

McCarthy, DJ.: If he has those books, couldn't he have taken them to the General Court and shown them to the members of the House and Senate? And couldn't it have been cured that way by giving him until 3 o'clock in the afternoon? Couldn't that have been done?

Mr. Ehrmann: Well, this isn't in the bill of complaint but there have been efforts to change the law and have been unsuccessful, as Mr. Leen has pointed out in his brief.

McCarthy, DJ.: Did what's his name, Mr.—did the manager of this particular store, or did the stockholders of this particular corporation, come in here at any time to get legislation which would cure this defect through the General Court?

Mr. Ehrmann: Mr. Chernock did get such a letter and he was assured that there would be the bill—that a bill would be passed, and he was finally notified that it didn't [fol. 98] even come out of— No, I think after the second reading that was the end of it. It is not in the complaint, but I think it is a fair question. There has been this effort.

McCarthy, DJ.: What about the activities of the owners? You say he is the only one to come in?

Mr. Ehrmann: No, he is—it's not in the complaint but he is a quarter stockholder.

McCarthy, DJ.: That's right. The corporation has done nothing about it.

Mr. Ehrmann: Well, it wasn't—

McCarthy, DJ.: No, they didn't, did they? The fact is they didn't, by name, make any attempt to obtain relief from the Massachusetts Legislature, the General Court, as you say. Did they?

Mr. Ehrmann: I don't distinguish between them. He was acting for the corporation.

McCarthy, DJ.: No, did the Crown Kosher Super Market of Mass., Inc., at any time ask for relief of the General Court?

Mr. Ehrmann: Yes, the Springfield legislators filed a bill on behalf of Crown Super Market and others that were situated that way, which passed the House and was rejected by the Senate. However, that would have no bearing on constitutional rights.

McCarthy, DJ.: I think that's right.

Mr. Ehrmann: As your Honor knows, this past year [fol. 99] there was an effort to change the law in the State of New York. Unfortunately, it led to a donnybrook and religious passions were aroused. One group was pulling this way and another group was used for propaganda purposes by both sides. It would seem to me that is not the way to approach the subject.

McCarthy, DJ.: It was this same question, wasn't it?

Mr. Ehrmann: I beg your pardon?

McCarthy, DJ.: It was this same question that was raised in New York, substantially?

Mr. Ehrmann: Not quite.

McCarthy, DJ.: I mean substantially.

Mr. Ehrmann: It was a question of—

McCarthy, DJ.: No, wasn't it substantially the same question?

Mr. Ehrmann: The same type of law, yes.

McCarthy, DJ.: That's right.

Mr. Ehrmann: There are quite a few states in the Union that have that exception. Ohio, for instance.

McCarthy, DJ.: That's right.

Mr. Ehrmann: That type of case was quoted on Mr. Leen's brief. The state of Ohio has a statute which says that it shall not apply to people who observe the Sabbath as the seventh day of the week conscientiously. So that question doesn't arise in Ohio or some other state in the Union. I think Indiana is another one.

Now, where was I? Should I return to the—

[fol. 100] Magruder, Ch.J.: I wish you would.

Mr. Ehrmann: The question raised by Mr. Elcock—the reason I was going to quote this Oregon School case was because it was so beautifully stated. I am going to give you confirmatory decisions in a minute. That case, which is 296 Fed. 928, was affirmed, and the Court said there—

McCarthy, D.J.: What case are you reading from?

Mr. Ehrmann: I am reading from my brief.

McCarthy, D.J.: What page is it?

Mr. Ehrmann: Page 25.

McCarthy, D.J.: What?

Mr. Ehrmann: Page 5 [Reading:]

"The question as to equitable jurisdiction is a simple one and it may be affirmed, without controversy. The jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege or immunity, threatened or active, to the detriment or injury of a complainant, is inherent, unless such party has a speedy and adequate remedy at law; and in the exercise of such jurisdiction, the Court may, in proper cases, restrain state officers clothed with authority for enforcing laws, from the threatened enforcement of a State law which contravenes the Federal Constitu-

[fol. 101] tion, wherever it is essential in order effectually to protect property rights and rights of persons against injuries otherwise irremediable.

The principle that the remedy at law, if relied upon to supplant the equitable jurisdiction, must not only be plain, speedy and adequate, but as adequate, complete, practical and efficient to meet the ends of justice as that in equity, is so well settled as to need no citation of authorities.

It cannot be questioned that a party affected by an unconstitutional act need not wait until some step is

taken, under the act, that would affect him injuriously. One does not have to await the confirmation of threatened injury to obtain injunctive relief."

And in the case of *Terrace* v. *Thompson, Atty-Genl*, 263 U. S. 197, the Court states it even more plainly:

"They (the plaintiffs) are not obliged to take the risks of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their right. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal constitution."

[fol. 102] Now the Chernock case which was cited by my brother, also is on our brief, is finished. Mr. Chernock has been convicted, he took his exceptions to the Massachusetts Supreme Court, and his conviction was affirmed. That case is over. It isn't a question of res judicata or anything else. That case is over. Mr. Chernock paid his fine. However, the fact that he has been convicted makes it all the more urgent for him to come in here.

You may recall the Alabama bus cases. That situation was involved in *Browder* v. *Gale*. There are so many similarities to our case that perhaps it ought to be cited more particularly. That is *Browder* v. *Gale*, 142 Fed. Supp. 707; affirmed 352 U. S. 903. That was a representative suit brought by four colored people to test the constitutionality of the Bus law and ordinances that enabled the races to be segregated in buses. These colored plaintiffs had been arrested and convicted, just as Mr. Chernock has, although he is not technically a party to this suit. That didn't deter the Court from going in, and the same argument was raised, and the Court said, on page 73:

"The defendants, relying on Alabama Public Service Commission v. Southern Railway Co. at 341 U. S. 341, insists that even if the Federal Court has jurisdiction, it should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the

[fol. 103] construction and validity of the statutes and ordinances. The short answer is that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal Courts have the responsibility as heavy as that which rests on the State Courts."

And a number of cases are cited there.

One of the cases cited is *Doud* v. *Hodge*, 350 U. S. 485, 487, which was also a 3-Judge Court, to enjoin the auditor of Illinois from enforcing a certain act on the ground it was alleged to violate the Fourteenth Amendment, and the District Court dismissed the complaint on the ground that it lacks jurisdiction in the absence of an authoritative determination by the Supreme Court of Illinois, and the United States Supreme Court held that it was error to dismiss the complaint for lack of jurisdiction—that the District Court should have held and decided the case.

The desegregation cases dealt with the same problem. There you also had statutes that could be tested in the State Court; and in all of the cases, three of them, they brought their suits before a 3-Judge Court. The fourth case I think came up on mandamus but the other three came before a 3-Judge Court on a petition for injunction and a declaration of rights such as we have here.

[fol. 104] Now I don't know where that case of Time Films which is cited by my brother is in the District Court of the United States. I looked in the index and could not find it. For some reason or other—Miss Tweedy helping me—we could not find it indexed anywhere. It is true it was later decided by the Massachusetts Supreme Court, which held that Section 4 of this same chapter. 136, unconstitutional; and there, there is some indication as to perhaps why the case did not fit here—although I am speaking of something of which I know naught. But then there was another case pending in the Massachusetts Courts, *Brattle Films* v. *Commission of Public Safety*, 333 Mass. 58; and the Time Films case is 333 Mass. 62. The other case involved precisely the same issue, and the Massachusetts Supreme Court said, nothing appears that the

proper officers of Massachusetts omitted the point decided in the other case. So possibly that is the reason. I do not know. I wasn't there. Mr. Elcock was there and I wasn't. But I could not find it indexed in this court.

Now, on the question of constitutionality, with the assistance of the Court we have already developed a number of questions. The plaintiffs here say that where liberty is interfered with, as it unquestionably is here—because unless there is something to justify the exercise of the police power it is unconstitutional to tell a store it can't open on Sunday or any other day and so prevent customers from [fol. 105] exercising their right to buy food. I do not think the Court would want me to argue that, although the Opinion of the Justices of Massachusetts, 300 Mass., I think it is 615, clearly states that.

So the question is, then, on what ground is this interference with the liberties of these people justified? If there is violation of First Amendment rights, as is claimed here, as well as Fourteenth Amendment rights, then the cases indicate that that police power cannot intrude itself in the First Amendment unless there is an emergency, or unless there is such a serious situation that it requires the intervention of the State. Those rights are different from the Fourteenth Amendment rights. The law is well stated in the Barnette case. Perhaps I would read that, because this is one of the very important things in this matter that confronts us. In the case of *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624—that, by the way, was a Flag Salute case—the Court said:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourth Amendment, because it also collides with the principles of the First, is much more definite than the test when [fol. 106] only the Fourteenth is involved."

Then the Court goes on at some length and says:

> "It is important to note that while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case."

The principle was reiterated in *Thomas* v. *Collins*, 323 U.S. 516. That was the case of the union organizer who was caught under a statute requiring him to get a permit before he could solicit membership. On page 530 the Court says of the First Amendment liberties:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

Now what are those dangers that Chapter 136 involves so far as these people are concerned? Parenthetically I would say to the Court, as we did on our supplementary brief, that it may not be necessary to attack the entire act provided its application against these particular plaintiffs to observe another day of the week may be held to be unconstitutional. What is that grave danger that threatens the community? These people already observe a day and [fol. 107] an evening as strictly sacred. So far as their working anybody else is concerned, there is already a statute regulating employment in Massachusetts. They can't work anybody without giving them at least 24 hours off. What kind of a day of rest is it that says you may only sell tobacco provided you sell tobacco the other six days, or that you can sell certain other articles provided you sell them on secular days? That is, that you work the other days and then you can work on Sunday, but if you don't you can't.

What is this day of rest? Take this 6 to 10 exemption which I am sure the General Court intended as a concession and tried to be fair—but it's just impossible. It can't work. Now what does it say about working? Here's a day of rest that says that a store can be opened at 6 o'clock in the

morning. I don't know how the judges of this court rest, but I want to rest at 6 o'clock in the morning, at 7 o'clock in the morning, and, if my conscience is clear, until 8 o'clock in the morning. But here is a store that is supposed to be open to customers at 6, at 7, at 8, and then has to close at 10. Now why does it have to close at 10? Why does the bootblack have to stop at 11? Why does the selling of bread have to end at 10? Why does a parade have to stop when it gets within 100 feet of a church—stop playing the music within a hundred feet of the church; or games can't be played near a church?

It is clear that the whole statute dealing with exceptions is directed toward preserving Sunday as a day of worship [fol. 108] for people a majority of whom belong to a different faith, and there isn't a word in the statute anywhere to indicate that it is supposed to be a day of rest. In fact, they are encouraged not to rest because we now have, by exceptions, baseball, hockey, and two years ago they added lawn bowling. Practically all the sports, professional and amateur, are now permitted.

The progress of these exceptions has been to make people work more on Sunday than they ever did before—not to establish a single day of rest. And it is stated that the earlier Massachusetts cases said it was to be a day free of labor and amusement. Now we have plenty of amusement on Sunday. But, if that is the purpose of the Act, how would keeping open a kosher shop to sell food to people interfere with those people who want to go to the baseball game or play tennis or golf, or picnic? I suggest on my brief that maybe they would like to get a sandwich to help their picnic. There is no interference at all.

Who are the people who are resting while this store is open whose rest would be disturbed? The employees have already had 24 and more than 24 hours' rest. Are the others resting after 10 o'clock but not before 10 o'clock?

I think, when you look over this Chapter 136, your Honors will see that there is an utterly impossible police job if that Act were enforced, just utterly impossible. With all the different times and conditions and limitations that [fol. 109] appear in it, there is no possible way in which that can be enforced.

The plaintiffs claim that their rights under the First Amendment both as to established church and their liberty are infringed. They all complain that their rights under the Fourteenth Amendment are infringed. The situation is somewhat different there. These considerations do not have to be as grave. The test there simply is, is the reason a reasonable one for the exercise of the police power? And, if it is reasonable, is the statute directed actually toward that end? And if the question is raised, as it is here, concerning equal protection of the law, does it make sense as a classification? Does it make sense when a drug-store can be open and a grocery store can't, or does it make sense they can sell tobacco but not a pastrami sand-which? Where is there rhyme or reason in connection with it?

I will say this, that if the purpose of the statute were held well enough, which it doesn't appear to be—although it may have some subordinate object of that type but doesn't appear in the statute itself or from anything we know of it—if it had that as an end, then we would have to consider whether or not the statute itself is directed reasonably toward that end.

I have here a compilation which I made of some of the commercial things which may be done on Sunday. This does not include the many amateur and voluntary things [fol. 110] which may be done, but only the things that are done for money; and the Court will see from this list that apparently what has happened is simply this. They start off with a Blue Sunday, with no exceptions. And then if different groups want to do different things they pressure the Legislature to get it done—not to make sure that there is a day of rest in seven but to make sure there isn't going to be a day of rest in seven. They want to do other things.

There are only three bases on which this statute can be held constitutional as I see it—or, let me say, on which it can be supported. The first is that it is religious in its significance and sets up Sunday as a religious holiday. If it does that and, I might add, if the effect is to do that as well as its object, it is clearly, under all the decisions that we have, unconstitutional. Even the State of New

York, which has held a law different from ours but the effect is the same, has said that if it created a religious holiday it could not be held constitutional. So they do the same thing that our court did in *Commonwealth* v. *Has* and said it isn't that at all—it is simply to create a day of rest. And Massachusetts has followed that up with decisions coming after *Commonwealth* v. *Has,* stating it was a religious holiday. We have some of them cited on our brief. But it is only when somebody brings up he observes another day that this has come in.

Now there are four cases that I know of in Massachusetts to my knowledge where the defendant has raised the fact [fol. 111] that he himself observes another day. There is a collection of cases. The first one is the foundation case of *Commonwealth* v. *Has,* which has been cited here, where the court simply out of hand said it is not a religious day at all, it's a day of rest. That case is the basis for the other three decisions.

Another case is *Commonwealth* v. *Kirshen,* in which a Jewish defendant was operating a shop and he tried to comply with *Commonwealth* v. *Has* and left the door open to his shop. He didn't open it wide, but just left it unlocked so that the workmen could come in and work. He observed the Sabbath, and so did his workmen; and the court came out with a curious decision there, if your Honors please, because it has a bearing on this. The Court there began to construe the words "keeps his shop open" and said, it is true the shop is closed to the whole world but it was open to the employees and therefore we ruled it was open. In other words, part of the statute no longer means disturbing anybody else, it is disturbing the workers who already have had 24 hours and who want to work—they are the ones that were disturbed. That is the case of *Commonwealth* v. *Kirshen.*

Another case is that involving Mr. Chernock, who is the manager of the store in the present case, where the Court simply relied on *Commonwealth* v. *Has.* It did not re-examine the statute at all. It has never been re-examined. [fol. 112] I think there was another case involving a kosher butcher shop; and that case, again, did not consider

the hardship on the defendant or examine the statute; it simply said he kept his shop open and that's that.

Just as a matter of record I think perhaps I should read these four cases in, because I think they are the only cases that deal with defendants who claim they observe the Sabbath.

Oh, there is *Commonwealth* v. *Hyneman.* That is an interesting case. That was the first case. That is *Commonwealth* v. *Hyneman,* H-y-n-e-m-a-n.

Woodbury, CJ.: Will these be in your brief, Mr. Ehrmann?

Mr. Ehrmann. Not all of them. *Commonwealth* v. *Hyneman* is not.

Magruder, Ch.J.: What citation?

Mr. Ehrmann: 101 Mass. 30. That is a very interesting case. In that case the defendant violated a statute by selling liquor on Sundays; and it is interesting to note that the Court held this had nothing to do with the Sunday statute, the Commonwealth was regulating the liquor traffic and maybe it might have been unconstitutional if it had been brought just under the Lord's Day statute because Hyneman said he closed on Saturday. That case expressed a little doubt.

The next case is *Commonwealth* v. *Has,* which we have discussed. This is the foundation case and the only Massa- [fol. 113] chusetts case that has characterized the Act, the first case that has characterized the Act as a rest case. That is 122 Mass. 40. Has is H-a-s.

Woodbury, CJ.: That is in your brief?

Mr. Ehrmann: That is in the brief, yes.

The next is *Commonwealth* v. *Starr.* I'm not sure I did cite that one. That is *Commonwealth* v. *Starr,* 144 Mass. 359. That was the kosher butcher. The conviction was sustained on the authority of *Commonwealth* v. *Has.*

Then there is *Commonwealth* v. *Kirshen,* 144 Mass. 151, which I mentioned a moment ago. That was the fellow that left the door of his shop open so the workmen could come in.

And the last one is *Commonwealth* v. *Chernock,* 1957 Advance Sheets 1057.

McCarthy, DJ.: May I interpose to ask you what was the page on Kirshen, 194 Mass.? Is it 151?

Mr. Ehrmann: Kirshen, 151.

McCarthy, DJ.: Thank you.

Mr. Ehrmann: However, except for the case of *Commonwealth* v. *Chernock* and there are Massachusetts cases galore, holding that, quite opposite to *Commonwealth* v. *Has*, it is a religious day:

Commonwealth v. *Dextra*, on page 7 of my brief, 143 Mass. 28.

Commonwealth v. *White*, on page 8 of my brief, 190 Mass. 578.

[fol. 114] *Commonwealth* v. *McCarthy*, 244 Mass. 484.

And there are other cases. That Somerville case, *Commonwealth* v. *Somerville*—I don't see the quotation of that here.

Woodbury, CJ.: You have *Davis* versus *Somerville*, for that on your brief.

McCarthy, DJ.: That is right. That case is in your brief.

Mr. Ehrmann: Yes.

Woodbury, CJ.: 128 Mass.

Mr. Ehrmann: Oh, yes, I have it in the index to the brief, if I can find it. 128 Mass. 594, cited on page 6 of the brief. And I believe there are additional cases quoted on the brief of the intervenor for the International Religious Liberties Association.

In all those cases where the defendant did not raise the issue that he was a Sabbath Day observer, a seventh day Sabbath observer, the Court made no bones about it. They said it is a religious holiday. And even today, the very cases that my brother refers to, the Time Films case and the other one—I think it's the first case—they were companion cases—in holding Section 4 unconstitutional (of 136), the Court said:

> "It is unthinkable that there is a power absent as to secular days to require sufficient advance scrutiny by governmental authority."

[fol. 115] The words "secular days" appear in the statute several times and in decisions dealing with the statute.

The word "secular" does not have any mythical meaning. It means non-religious, non-ecclesiastical. The statute itself uses the word "secular", and the decisions refer to the other days than Sunday under this statute as secular days. And the only case that gave it any consideration, and that was very brief and cursory, was *Commonwealth* v. *Has*.

I hope that this Court will really consider the statute itself, because if you let the light fall and look at it, it ceases to conform to the assumption that it sets up a day of rest. It doesn't do anything of the kind as a religious statute itself. It sets up a religious day subject to certain exceptions. Those exceptions all indicate that people could work seven days a week instead of six, and that is the import of the entire statute.

Now, I have been talking a long time, if your Honors please,—

Magruder, Ch.J.: It is nearly 1 o'clock. What do you want to do? Do you want to put in some evidence? Is there a stipulation? You said you had a stipulation.

Mr. Ehrmann: Yes. I should perhaps also say—I'm going to put the stipulation in now—that early in this case the plaintiff had a motion for a preliminary injunction, and your Honor suggested that instead of going on with [fol. 116] that motion the parties stipulate they would hold things in statu quo until this Court had had a chance to decide it. The solicitors in Springfield were kind enough to make such an oral stipulation, it wasn't written, and they have not violated it. They have not proceeded to have the statute enforced.

[Counsel sign stipulation and hand it to the Clerk.]

Magruder, Ch.J.: All right, Mr. Ehrmann. It is now 1 o'clock. How much more time do you think you will need, or is there any further witness that you want to call, or what?

Mr. Ehrmann: I would call Mr. Chernock for the purpose of explaining the difficulties of operating his store and many of the things that are already set out in the bill of complaint. I don't think it will take very long.

Magruder, Ch.J.: Mr. Elcock, do you want some more time after Mr. Ehrmann is through?

Mr. Elcock: I won't want time for witnesses, your Honor, as far as I know. I would like to examine some of his witnesses.

Magruder, Ch.J.: I am quite willing to sit if we won't be too long and get the case finished.

Mr. Ehrmann: How about now?

Magruder, Ch.J.: Now, or would you rather come back at 2:00 o'clock; which would be more sensible. Do you know how long you expect to take?

Mr. Ehrmann: Well, I don't think my direct examination of Mr. Chernock will take more than 15 minutes, but there [fol. 117] would be cross-examination.

Magruder, Ch.J.: We will take a recess and come back at 2:00 o'clock, Mr. Ehrmann.

[Recess from 1:00 p.m. to 2:00 p.m.]

[fol. 118] Afternoon Session

McCarthy, DJ.: Mr. Ehrmann, I would like to ask you a question because I may possibly be in error. When you say this matter was presented to the Court for relief, it wasn't presented as a specific matter concerning the plaintiff company that is here now; it was presented as an omnibus matter, wasn't it, covering everyone that was working in this field?

Mr. Ehrmann: As I understand the law—I had no direct contact with it—there was—

McCarthy, DJ.: I had, and I think you'll find I'm right.

Mr. Ehrmann: I think this was what they call the "fair Sabbath" law, that is, anybody who observes, closes on another day than Sunday—

McCarthy, DJ.: It is a general law that is covered already by a section of that code, that is, with reference to those at least have a similar position with reference to their devotion to the omnibus theory, they do not work on Saturdays and they are allowed if that is the case to work on Sundays. That was a clarification statute when it was presented and that is why it didn't come up or didn't pass. There was never anything filed by the kosher meat men.

Mr. Ehrmann: No, it was presented by three legislators from Springfield.

McCarthy, DJ.: Well, it didn't mention any—

[fol. 119] Mr. Ehrmann: There wasn't any particular store that would file a bill anyway, your Honor.

McCarthy, DJ.: It applied generally to everybody.

Mr. Ehrmann: Well, it applied—it is what they call, as I understand it, a "fair Sabbath" law. It applies to anybody who out of religious reasons observes another day.

McCarthy, DJ.: So they pass that and everybody said they observed it; it was one of those bills that was passed by the General Court predicated upon a hearing with particular reference to that which they sought, to get relief.

Mr. Ehrmann: Well, they had such laws in Ohio, Indiana, and many other states.

McCarthy, DJ.: I wanted to correct what you said to the Court.

Mr. Ehrmann: What was it I said that you say is—

McCarthy, DJ.: You said there was a bill presented and that it passed one branch of the House, one branch of the General Court, and never came out of the second.

Mr. Ehrmann: Yes.

McCarthy, DJ.: Well, it wasn't a bill with particular application to your clients. It was the bill that affected everybody.

Mr. Ehrmann: Why, certainly, it had to be. You couldn't get a bill—

McCarthy, DJ.: It was set forth in the bill.

[fol. 120] Mr. Ehrmann: Yes.

McCarthy, DJ.: It didn't concern the merits of your claim to remain open on Sunday.

Mr. Ehrmann: Any bill that applied just to—

McCarthy, DJ.: That wasn't presented particularly.

Mr. Ehrmann: Well, any bill that applied to what one store could accomplish would be clearly unconstitutional. It had to apply to a general class, or else it would be denying due process of law.

McCarthy, DJ.: No bill applying to a general class which can be stated in plain language to be kosher meat dealers. There is no record of any bill being presented to the General Court.

Mr. Ehrmann: No, I don't think there was.

McCarthy, DJ.: That's right.

Mr. Ehrmann: I don't know.

McCarthy, DJ.: That's why I want to correct the record on it.

Mr. Ehrmann: But that could be. It was not a bill applying to kosher meats, but it was a bill that applied to all religious groups who close up their stores on another day out of conscientious religious beliefs.

McCarthy, DJ.: It applied to anybody.

Mr. Ehrmann: I don't know that it applied to anybody except—

[fol. 121] McCarthy, DJ.: I don't want you to feel that I'm opposed to that, because I'm very strong for it.

Mr. Ehrmann: Well, I'm sorry if I misled anybody. I don't want to.

McCarthy, DJ.: Why don't you look it up? You'll find I'm right.

Mr. Ehrmann: Yes, you are right, I know you're right.

McCarthy, DJ.: I know I'm right.

Mr. Ehrmann: I think you're right. I never heard of a bill being introduced just with respect to kosher meats, but I did hear of what they call the "fair Sabbath" law respecting people who conscientiously observe another day who could be excused whether they sell or do not sell kosher meats.

Incidentally, that exemption that occurs in Section 6 has been ruled in *Commonwealth* v. *Has* not to include the opening of a shop. That exemption reads very broadly; in fact, in some states it has been construed to include the opening of a shop. It says, "nor shall it prohibit"—I'm now reading from the fifth paragraph of Section 6—

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually [fol. 122] refrains from secular business and labor on that day, if he disturbs no other person thereby."

Magruder, Ch.J.: What is the statute you are reading?

Mr. Ehrmann: I am reading from Chapter 136, Section

6, the first sentence of paragraph 5. Now that has been construed in *Commonwealth* v. *Has* as not permitting—

Magruder, Ch.J.: Well, now, Exhibit A doesn't have any such sentence in Paragraph 5, Section 5, rather, of the statute. Has something been added there? Exhibit A to your complaint has only a single sentence in Section 5, not this thing you have read.

Mr. Ehrmann: If your Honor will turn to Exhibit A, Section 6, the fifth paragraph that occurs on page 3, the first sentence reads as I have read. Now, as you read it you would think that certainly would permit the opening of a shop or store.

Magruder, Ch.J.: Well, you mean the selling or delivering of kosher meats?

Mr. Ehrmann: No, the next sentence, beginning with the next paragraph.

Magruder, Ch.J. [Reading]:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and [fol. 122] actually refrains from secular business and labor on that day."

Now why doesn't that cover your clients?

Mr. Ehrmann: Because the Commonwealth of Massachusetts Supreme Judicial Court has so decided.

Magruder, Ch.J.: In what case?

Mr. Ehrmann: *Commonwealth* v. *Has* and many other cases.

Woodbury, C.J.: The Chernock case, I take it, would confirm that, wouldn't it?

Mr. Ehrmann: The Chernock case would confirm it.

Woodbury, C.J.: That is to say, the Court, the Massachusetts Supreme Judicial Court has said that keeping the petitioner open caused a disturbance to other people, or words to that effect.

Mr. Ehrmann: That is correct. It says in the case of *Commonwealth* v. *Has*, 122 Mass. 40, 41, they construe that very provision, and they say:

"The ruling of the presiding judge was, in effect, that the provisions of the 9th section could not be extended so as to permit the act of keeping open a shop upon the Lord's Day. This interpretation was correct. That the 9th section is not intended to permit, to the persons therein described, all the acts expressly forbidden in the previous sections, such as being present [fol. 124] at dances or public diversions or taking part in sports or plays, is quite clear."

Now, unfortunately, this Court also I should suppose is bound by stating the construction of its own statute, and if they say it means that, I would assume this Court would accept their construction.

Magruder, Ch.J.: Then what does this "secular business and labor" refer to here? It is keeping open and selling the products of the store, is it not?

Mr. Ehrmann: Well, I'm not sure I know what it means, if your Honor please, but I know what it doesn't mean according to that decision. It doesn't mean they can open a shop.

Magruder, Ch.J.: All right.

Mr. Ehrmann: As a matter of fact, there is considerable difficulty with respect to this entire statute, and this provision has been construed not to permit the opening of a shop. In some other states in almost exactly the same language it is construed the other way. Why they regard opening a shop as being business and labor I don't know but that is the decision of the Court. They say the history of the two sections is different and they stick to the history —they separate the two and they stick to that history.

Now I spoke before concerning the matter of a limited decree if this Court should hold Chapter 136 unconstitutional, particularly on the grounds of the First Amendment. [fol. 125] In that reply brief we filed we mentioned one case but there are also other cases, including the Massachusetts case cited by my brother, *Brattle Films* v. *Commonwealth*, 333 Mass. 58, and *Time Films* v. *Commonwealth*—

Woodbury, DJ.: Where is that, Mr. Ehrmann?

Mr. Ehrmann: They are not in my original brief. This point was raised by the brief of the intervenor; and in my reply brief I cited *Thomas* v. *Holland*, 323 U.S. 516, where the decree was limited to the facts of the particular case and relief afforded the class represented by the plaintiffs. The same is true of *Murdock* v. *Pennsylvania*, 319 U.S. 105. And in *Brattle Films* v. *Commonwealth*, 333 Mass. 58, and its companion case *Time Films Corporation* v. *Commonwealth*, 333 Mass. 62, the Court carefully said that it was limiting its declaration as to unconstitutionality only as it applied to those represented by the plaintiff under the facts stated.

McCarthy, DJ.: Could I have that case again, the one just before the last one?

Mr. Ehrmann: Brattle Films—

McCarthy, DJ.: No, I have that. The other one.

Mr. Ehrmann: *Time Films Corp.* v. *Commonwealth*, 333 Mass. 62.

McCarthy, DJ.: That is not the one I mean. This is *Murdock* v.—

Mr. Ehrmann: Oh, *Murdock* v. *Pennsylvania*.

[fol. 126] McCarthy, DJ.: Yes.

Mr. Ehrmann: 319 U.S. 105. That was practically the windup of a group of those Jehovah's Witnesses cases that were more or less gathered up in this Murdock case and finally decided by the United States Supreme Court. There are many other cases. I cite those as representative in which the Court has set forth the application as against these particular plaintiffs was unconstitutional. However, the law as a general law may be valid. For instance, the law requires people who sell magazines to take out a license—that is in the Murdock case—could be a valid law; but where that law is pushed so as to prevent a distributor of religious literature from getting back the cost of printing the item was held unconstitutional in that it infringed the right of free speech. Likewise in the Thomas case they held that the state had a perfect right to regulate a labor union, and even to require the obtaining, or at least the filing of a certificate before membership was solicited, and when that was used and pushed to the extent of deny-

ing labor organizers the right to speak because they were also soliciting membership, they held as to that type of plaintiff it was unconstitutional.

I have here a certificate which my brother has agreed may be introduced. I have only one copy. It is a certificate by the secretary of the Massachusetts Council of Rabbis, of which Mr. Sheinkopf is president, as he alleges in the [fol. 127] bill of complaint, and this certificate reads as follows:

> "I, Rabbi Moses D. Sheinkopf, Secretary of the Massachusetts Council of Rabbis, hereby certify that at a meeting of the Massachusetts Council of Rabbis held on October 30, 1958, the following resolution was passed:
>
> > VOTED, That the action of Rabbi Moses D. Sheinkopf, President of the Massachusetts Council of Rabbis, in joining as plaintiff in a case pending in the United States District Court for the District of Massachusetts of Crown Kosher Super Market of Massachusetts and others' v. Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, being Civil Action No. 58-471-M, as representative of the members of this Council, be and is hereby ratified, approved and confirmed."

Mr. Elcock: If this is offered as evidence—my brother has stated I have assented to it. I have assented to the fact that there is a certificate here, but I don't think the substance of that certificate is pertinent to this particular hearing. I don't think a vote of that sort can join them as [fol. 128] parties to this proceeding, and I would object to the substance of it although not the form of it.

Mr. Ehrmann: There is no desire whatever to limit my brother's argument. I can't do that. He is entitled to argue that this is not a representative suit. But I would call to the attention of the Court that this is the way these cases are ordinarily presented. The desegregation cases are presented by a few plaintiffs on behalf of all others so situated. That is *Brown* v. *The Board of Education*, 347 U.S. 483, 495, in which the Court said that because

these are representative cases—then goes on from there. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Browder* v. *Gale*, 142 Fed. Supp. 707; affirmed 352 U.S. 903—were all cases similar to this one in which those people brought suit in behalf of all others similarly situated because it is obviously impossible to make all others similarly situated plaintiffs in the suit.

Mr. Elcock: I withdraw my objection assuming it is also indicated that it is representative of the Massachusetts Council of Rabbis because they are parties in the suit.

Magruder, Ch.J.: As I understand it, this is an affidavit sanctioning the entry into the case as representative of the Rabbis on behalf of the other Rabbis.

Mr. Ehrmann: That is all it is.

Magruder, Ch.J.: All right.

McCarthy, DJ.: Are they all Orthodox Rabbis?

[fol. 129] Mr. Ehrmann: They are only Orthodox Rabbis. Orthodox Rabbis?

McCarthy, DJ.: Yes.

Mr. Ehrmann: Yes. This is merely to support the allegation that they are representative.

Magruder, Ch.J.: This is merely to support the allegation?

Mr. Ehrmann: That is right.

Now, Mr. Chernock.

HAROLD CHERNOCK, sworn.

Direct examination.

By Mr. Ehrmann:

Q. Where do you live, Mr. Chernock?
A. At Springfield, Massachusetts. 77 Prospect Street.
Q. Will you try to speak a little louder, please?
A. I will.
Q. What is your business?
A. I am at the Crown Kosher Super Market.
Q. Are you the manager?
A. I am the general manager of that store.
Q. Are you the Harold Chernock mentioned here this

morning as being the defendant in the complaint against you for keeping the store open on Sundays?

A. That is right.

Q. Is the Crown Kosher Super Market a corporation or a partnership?

A. It is a corporation.

[fol. 130] Q. How many stockholders are there?

A. Four all together.

Q. Are they four genuine stockholders or are they the wives of—

A. No, they are four genuine stockholders.

Q. What is your religion, Mr. Chernock?

A. I am Jewish.

Q. What branch of Judaism?

A. Orthodox.

Q. Whether or not you are an observer of the Sabbath?

A. I am.

Q. In your day to day life?

A. I am an observer of the Sabbath, that's right.

Q. Is your store closed from Friday sundown to Saturday sundown?

A. Till Sunday morning.

Q. How long have you been in the general business of a kosher market?

A. Oh, about 30 years now.

Q. How long have you operated a kosher market in Springfield?

A. In the Crown Kosher?

Q. Yes.

A. Since August 18, 1953.

Q. 1951?

A. 1953.

Q. Would you define for the Court what you mean by a super market?

[fol. 131] A. Well, we do sell everything. I mean, by everything, we sell meats, delicatessen, groceries, baked goods, ice cream.

Q. That is, you sell everything that is sold in a grocery and butcher shop?

A. We advertise a one-stock store. We sell everything in our stores.

Q. Are there any other such stores in the Springfield vicinity?

A. You mean where they sell in a kosher super market?

Q. Yes.

A. No, not in that vicinity.

Q. Where is the nearest such store?

A. The nearest one to my knowledge is in Hartford, Connecticut.

Q. Are there any items in your store that you sell that are not kosher?

A. There may be some groceries that are not strictly orthodox, such as crackers and some standard soups.

Q. Do you sell any meats that are not kosher?

A. No, I do not.

Q. And about what percentage of your groceries would you say is not kosher?

A. I would say 5 per cent, maybe.

Q. Now, are there other stores that sell kosher products in the Springfield area?

A. There is a few kosher butcher shops but not super markets.

Q. So that the only kosher stores of which you are aware [fol. 132] are the kosher butcher shops?

A. That is right.

Q. Are you thoroughly familiar with the kosher business in that area?

A. Yes, I am.

Q. Why do you close your store on Saturdays?

A. We are not allowed to be open on that day. That is our Sabbath, and it is not permitted to be open. We never have been. We wouldn't be allowed to.

Q. You do it out of religious conviction?

A. That is absolutely right.

Q. Now would you tell the Court the hours and the days on which your store is open?

A. All day Sunday from 8 to 6; also Mondays and Tuesdays; we open Wednesday and Thursday until 9; we open on Friday to sundown.

Q. So that for three days a week including Sunday you operate from 8 to 6?

A. That is right.

Q. And two days, from 8 a.m. to 9 p.m.?

A. That is right.

Q. And one day, Friday, from 8 a.m. until sundown?

A. That is correct.

Q. And sundown—by the way, let me ask you this preliminary question. You say on Friday you close at sundown?

[fol. 133] A. That is correct.

Q. And sundown, of course, varies from week to week?

A. That is correct.

Q. And from month to month?

A. That is correct.

Q. So that your hour of closing is a variable hour each week?

A. That is correct.

Q. Are you in position to give the Court an opinion as to the religion of most of your customers?

Mr. Elcock: I pray your Honor's judgment. I don't think he is in any position to give an opinion on that question.

Magruder, Ch.J.: Has he answered the question?

Mr. Elcock: I object to the question, your Honor.

Magruder, Ch.J.: What?

Mr. Elcock: I object to the question.

Magruder, Ch.J.: The question is what?

Mr. Elcock: To give an opinion individually, and there hasn't been any preliminary statement of facts to show that he is an expert in this subject.

Mr. Ehrmann: I'm not asking the question of him as an expert, but as a man who is running his business and thoroughly acquainted with his customers.

Magruder, Ch.J.: Let him answer the question.

Q. Can you answer the question?

A. I have a fairly good idea. I know most of my cus-

[fol. 134] tomers, and I have an idea what church they belong to, whether they belong to the orthodox, conservative or what they belong to. They belong to all churches, to the different congregation

Magruder, Ch.J.: I don't understand the purport of this inquiry, that is, if you are asking about other localities.

Is it your contention that he does more business with people of the orthodox faith? Does their number enter into it? Is that what you are contending? Why do you ask him what percentage of his customers are of the orthodox faith? Is that relevant to this inquiry?

Mr. Ehrmann: It may be, depending on how this matter lies in your Honor's mind. I can see the possibility of a decree that may hold the law unconstitutional as applied to Jewish people who observe the Sabbath in so far as they sell to those recognizing it for a religious purpose. I can conceive of a broader decree holding the law unconstitutional as applied to anyone who observes another day as the Sabbath. And then I can see the possibility of a third decree that the law is unconstitutional anyway.

Magruder, Ch.J.: All right.

Q. In addition to the hours of the day you have given, do you also close on Jewish holidays?

A. Yes, we do.

Q. How many of those are there in the year?

A. There are thirteen days in the year when we keep our store closed, besides on Saturdays.

[fol. 135] Woodbury, CJ.: That is, you mean throughout the week?

The Witness: Yes.

Woodbury, CJ.: Except Sundays.

The Witness: Yes, not Sundays.

Woodbury, CJ.: Do you then operate a larger percentage than other stores?

The Witness: No.

Q. You are acquainted with Rabbi Sheinkopf, are you not?

A. Yes, I am. He is present here.

Q. Yes. He is your rabbi?

A. That is correct.

Q. What part does he have in connection with obtaining kosher products?

A. He is the rabbi in charge of our markets.

Q. And does he make inspections himself?

A. He has an inspector who does it for him.

Q. In the bill of complaint which you signed and swore to, you stated that at least a third of your business was done on Sundays?

A. That is correct.

Q. Have you at my request brought in your original day book in which you have inscribed your different sales?

A. That is the one right here [indicating]. That is the book.

[Said book handed to Mr. Elcock.]

[fol. 136] Mr. Elcock: Your Honors, there has been as yet no evidence introduced this man is acting on behalf of the corporation, that the directors have asked him to act, or the officers have asked him to act, or anyone else; nor is there any evidence that this book has come from proper custody, and until that is properly established and it is clarified as to whether this man is acting as the representative or as a private individual, I don't believe that this should be made available.

Magruder, Ch.J.: He is coming here as a witness, he is called as a witness, and he says he is the manager of the store.

Mr. Elcock: That is right, your Honor.

Magruder, Ch.J.: And would not the manager of the store be better able to testify than anybody else?

Mr. Elcock: That I don't know, your Honor; and I think that should be made clear, as to what his relation is to the corporate plaintiff here.

Woodbury, CJ.: But he says he is the manager, the general manager.

Mr. Elcock: But the general manager generally doesn't have custody of books.

Q. Are you also president?

A. I am president of the corporation, and I'm a 50 per cent owner of the business.

McCarthy, DJ.: Do you keep these books yourself?

[fol. 137] The Witness: No, we have an accountant that comes once a week, every Monday, to the store.

Q. This was kept under your direction?

A. That is right. I see it.

Mr. Ehrmann: This is offered.

[Account book marked Plaintiffs' Exhibit 2.]

Mr. Elcock: Your Honor, may I have an exception to the introduction of that book, on the ground that it has not yet appeared that it is a book kept in the usual and ordinary course of business.

Magruder, Ch.J.: He has testified, he has identified, he has qualified the book. I understood from his testimony the book was introduced as part of his testimony.

McCarthy, DJ.: Your objection is, that only books that are kept in the ordinary and regular course of business of this corporation are admissible?

Mr. Elcock: That is right, your Honor.

McCarthy, DJ.: And I understood him to say that this was under the supervision of an accountant who came in once a week, and I would assume on that basis that it was a book kept in the ordinary course of business.

Mr. Elcock: Thank you, your Honor.

Q. Now would you turn to the week ending last Friday, the seventh day of November.

A. Just a moment. Yes, I have it.

[fol. 138] Q. Now would you read off the sales as indicated in that ledger book for each day of the week ending November 7th?

A. The week of November 2d, that was Sunday, we did $4,114.69; Monday, $742.54; Tuesday we did $1,037.83; Wednesday, we did $1,716.41; Thursday, we did $1,412.24; Friday, we did $470.78. We took in a total of $9,474.49.

Q. Now will you pick any week in the month of October?

A. Yes.

Q. What week have you?

A. The week of the 19th.

Q. Your weeks begin on Sunday?

A. That is right.

Q. Will you give the volume of recorded sales for each day of that week?

A. I've got to find it: Just a moment, please.

Q. Have you got them?

A. Yes, it's right here. We were closed two days; Mon-

day and Tuesday we were closed. It was a Jewish holiday. So Sundays—

Q. Let's take a week with no holidays. Unfortunately, in October and September there are Jewish holidays in them and that throws the figures out.

Magruder, Ch.J.: It is quite obvious they made some sales on Sunday, otherwise they wouldn't keep open, and I don't quite see why that is so important.

Mr. Ehrmann: These sales run from 35 to 40 per cent. [fol. 139] of the entire week, and Judge Woodbury properly asked a while ago whether he really did so much business on Sundays, and his ledger here shows that he did more business, a larger proportion of business than the complaint alleged.

Q. You better let me take this.

A. Here's the record here [pointing].

Q. You have here the week of August 31st, Sunday, $3,670.05; Monday, Labor Day, $2,173.52; Tuesday, $1,036.61; Wednesday, $1,741.82; Thursday, $1,537.34; Friday, $649.55.

Now take the week beginning August 1st: Sunday, $3,042.25; Monday, $847.49; Tuesday, $960.85; Wednesday, $1,607.89; Thursday, $1,277.24; Friday, $418.69.

July: —

Magruder, Ch.J.: I don't suppose you have any means of knowing whether if you were required to close on Sunday he would make up the business on other days of the week?

The Witness: We would lose very much financially. We could never be able to overcome that deficit.

Magruder, Ch.J.: Why not?

The Witness: On Monday we do very little business, to begin with, because our meats do not come in that day. On Friday we do very little business because we close up early in the afternoon. That would leave us actually only three days to do business, Tuesday, Wednesday and Thursday.

McCarthy, DJ.: But you have no competition within 25 miles, have you?

[fol. 140] The Witness: There are other kosher markets but not a super market in Springfield. There are other kosher markets and other kosher grocery stores but not a combination under one roof.

Q. Now what would you say generally about the proportion of your weekly business done on Sunday?

A. Closer to 40 per cent than 30 or 35.

Q. You say you do very little business on Friday. Will you explain to the Court why that is so?

A. Friday is not a good shopping day because our people prepare for the Sabbath and they don't wait until the last minute to do their cooking; and, besides, we close up early in the afternoon.

Q. That is, orthodox Jews do not cook on Saturday?

A. They do not. They're not allowed to.

Q. Do they cook on Friday eve, Friday night, than Saturday?

A. That has been the habit.

Q. Is that your explanation of why you have less business on Friday?

A. It's been like that since I have been in the business. We never did any business on Fridays.

Q. On some of these days you close at 6 o'clock, and on other days you keep open until 9. If you kept open until 9 on Mondays and Tuesdays, would that relieve the situation?

A. On Monday it would make no difference because we don't get our meats in until Tuesday.

[fol. 141] Q. That is, your kosher meats.

A. That is correct.

Q. What days do they slaughter in a kosher meat shop?

A. They slaughter all day, but we get our meat on other days. We get it in on Friday and also on Tuesday, twice a week.

Q. Do you get something on Thursday?

A. Very little. We get mostly on Friday to have it for the Sabbath.

Q. Now the statute permits a store to open at 6 a.m. on Sundays, between 6 a.m. and 10 a.m., for the sale of kosher meat. To what extent, if any, would that relieve the situation if you had to close otherwise on Sunday?

A. Whoever would come up at 6 o'clock in the morning to do shopping? They would have to get up in the winter time in the middle of the night to get there on time. And, besides, we don't have anything prepackaged. We have to cut our meats to order, and it will take us an hour to get prepared to do any business, and we can't get anybody to come in to do two hours work at that time. They wouldn't come.

Q. How many employees do you have?

A. At present we have six.

Q. Six employees. In your opinion, would they come in on Sunday mornings at those hours?

A. If they would come in for a couple of hours, to begin with I would have to pay them for the whole day; and, besides, I don't believe anybody would come at that hour [fol. 142] to do any shopping.

Q. Now, what is the rule about washing meat according to the Orthodox requirement?

A. In our religion, meats can only remain 72 hours after it is killed and then it has to be washed all over again.

Q. And are your meats sold on Sunday washed on Sunday?

A. Sunday morning at 6.

Q. Who supervises that?

A. We have an inspector who is appointed by Rabbi Sheinkopf, and he does it on Friday before we close up, or he can work Sundays.

Q. And he comes in again at 6 o'clock on Sunday morning?

A. To cut it up.

Q. Oh, he cuts it up at 6 o'clock?

A. At 8 o'clock.

Q. At 8 o'clock.

Q. Mr. Ehrmann: That is all. Has the Court some questions?

McCarthy, D.J.: Do you close at 10 o'clock Sunday?

The Witness: Do we?

McCarthy, D.J.: Yes.

The Witness: No, your Honor.

Q. Mr. Chernock, attached to the bill of complaint which you signed was a list of several hundred names with addresses. Do you recall that?

[fol. 143] A. I remember a petition being signed, yes.

Q. How were those names obtained?

A. They were signed right in our store.

Q. That is, they signed an original petition, did they?

A. Yes, they did.

Q. Have you made a search for the original of that petition?

A. Have I?

Q. Yes.

A. I looked for it and I don't have it.

Q. Did you search—who is Mr. Fein?

A. Mr. Fein is our lawyer in Springfield, and that's why I figured it was there. We went looking for it and we couldn't find it. We took and we gave him the original after it was signed.

Q. Well, is the list that is annexed to your complaint a true copy of the signatures that were obtained in your store?

A. Of the people that signed? Yes, they are.

Mr. Ehrmann: I would add here, we discovered after we got here this morning that the missing originals are in the office of Ribicoff & Kotkin, in Hartford, Conn.

That is all I have now.

Cross examination.

By Mr. Elcock:

Q. How many officers are there in the Crown Kosher Super Market?

A. Four.

[fol. 144] Q. Who are the other three?

A. Myself. I'm the president. Jack Sloat, Sam Schwolsky, and Sam Smith.

Q. Do you know anything about their religion?

A. Yes, I do.

Q. What is it, the religion of each?

A. They are all Jewish Orthodox.

Q. They are all Orthodox. How many directors are there in the corporation?

A. I believe there is; besides them, my wife, and our accountant, Henry Shapiro.

Q. Can you tell us the religion of the other two directors that you have now mentioned?

A. Harriet, my wife, is the same religion as I am. Henry is a cousin of mine and he is also the same religion.

Q. In this particular bill which has been signed by you it appears that the Crown Kosher Super Market of Massachusetts is named as one of the parties plaintiff. Do you, from your status as an officer and director, know whether the board of directors ever took any vote to institute a proceeding of this sort?

A. Do I know that?

Q. Yes.

A. That they ever—well, they went along, yes. They are all in favor, of course, to go along with this suit.

Q. Did they ever take a vote to that effect?

[fol. 145] A. That I couldn't tell you.

Q. Do you have the records of the corporation with you?

A. I have not.

Q. What are these here [pointing]? Is this part of the records?

A. It's our money we take in every day.

Q. Are they corporate records? Do you consider those records of your corporation?

A. They belong to the Crown Market, yes, sir.

Q. When you signed this petition alleging that the facts therein were true to the best of your knowledge and belief, were you doing that as an individual or as an officer of the corporation?

Mr. Ehrmann: I object.

Magruder, Ch.J.: Where is that?

Mr. Elcock: That is the affidavit following the attorney's signature.

Mr. Ehrmann: My objection is, if your Honors please, it is a legal conclusion. The Crown Kosher Super Market is the plaintiff, and I think the signature speaks for itself, so does the acknowledgment.

Magruder, Ch.J.: I don't find any such affidavit. I don't know where it is.

Woodbury, CJ.: The complaint is signed by counsel.

Mr. Elcock: The next page, your Honor. I think on the copy I have there is an affidavit attached.

[fol. 146] Mr. Ehrmann: There is a verification.

Magruder, Ch.J.: Not on mine.

Mr. Ehrmann: It is on the top.

Woodbury, Ch.J.: It goes over to Exhibit A on the copy I have.

Mr. Elcock: Well, perhaps what they filed is not the same as the one which was given to me.

Mr. Ehrmann: I think the original— Have you the original?

McCarthy, DJ.: Here they are right here.

Mr. Ehrmann: My brother is referring to the acknowledgment in which Mr. Chernock acknowledges that the complaint is true to the best of his knowledge and belief, and he says that he is president and general manager of the Crown Kosher Super Market. I don't know whether this is relevant, this cross-examination. I have not objected to it. But I think it is established that the president of a corporation has a right and authority to initiate a suit for the protection of the interests of the corporation.

Mr. Elcock: I have asked—.

Magruder, Ch.J.: Is it your suggestion at this point that the plaintiff, the Crown Kosher Super Market, Inc., is not a proper party to this suit?

Mr. Elcock: I can't find that it has ever joined in it, your Honor.

Magruder, Ch.J.: Well, what do you require to evi-

[fol. 147] dence their approval?

Mr. Elcock: Well, I would say a vote of the corporation.

Magruder, Ch.J.: Isn't there authority that can be shown? Do you have to have a vote of the directors in order to authorize commencing suit in the corporate name?

Mr. Elcock: Your Honor, I cannot conceive of a corporation taking any action whatsoever in the absence of a vote or bylaws authorizing the specific action that is taken. But, your Honors, I don't want to push that too much. I'm just suggesting it.

Magruder, Ch.J.: The motion to dismiss does not suggest any difficulty about the presence of the corporation as a party plaintiff, does it?

Mr. Elcock: Well, now, there is an attempt here, your Honor, to show that the corporate plaintiff is injured, and, if that is so, I think the corporation certainly would have a right to come in and show it was injured, but I don't think somebody else could come in and show it was injured.

Magruder, Ch.J.: I don't suppose the corporate plaintiff could come in and show it was injured except by somebody authorized to make the statement.

Mr. Elcock: Certainly, your Honor; all they would need do is name the officer. Now I would call the Court's attention to the fact that when this gentleman signed he did [fol. 148] not sign as president, he didn't sign as treasurer or as director: he signed "Harold Chernock".

Mr. Ehrmann: He didn't sign it at all. He made an affidavit that the facts were true.

Woodbury, CJ.: It is signed by the plaintiff's attorney.

Mr. Elcock: I'm talking about the affidavit, your Honor.

Magruder, Ch.J.: Let me see it.

Woodbury, CJ.: What is that affidavit? I haven't got it.

Magruder, Ch.J.: [Reading]:

> "I, Harold Chernock, do depose and say that I am president and general manager of Crown Kosher Super Market of Massachusetts, Inc., and the allegations are true.
>
> (Signed) Harold Chernock."

Mr. Elcock: We have a contention, your Honors, on the motion to dismiss, that this proceeding has already been presented in court through Mr. Chernock, in the State Court, and that he was a party then interested; and I would like to say here that Mr. Chernock is likewise a party interested right here now, and that to some extent that other proceeding would be res judicata, and to that extent I think it is quite material. However, I believe the point has been raised, and I will proceed elsewise.

[fol. 149] Mr. Ehrmann: The other proceeding is adjudicated, Mr. Elcock. It is all over. He was convicted and fined, and that's that.

Mr. Elcock: But even if it is all over, your Honors, and he had an opportunity to raise that contention in another matter, he obviously can't come in here again later, and raise the same problem involving the same violation where there has already been an adjudication. He had an opportunity to appeal to the Supreme Court.

Mr. Ehrmann: He is not complaining about that conviction. He is in here because he is going to be followed up by repeated prosecutions. That's why he is here—to have this court determine whether that is a constitutional proceeding. That is all.

McCarthy, DJ.: Couldn't he have had it determined in the State Court?

Mr. Ehrmann: I suppose if it had been raised he could have had it. Yes, he could have.

McCarthy, DJ.: He appeared through counsel.

Mr. Ehrmann: I beg your pardon?

McCarthy, DJ.: He appeared through counsel?

Mr. Ehrmann: He did.

McCarthy, DJ.: And it wasn't raised?

Mr. Ehrmann: It was not raised.

McCarthy, DJ.: All right.

[fol. 150] Mr. Ehrmann: Any more than the colored people in Alabama when they were under attack.

Magruder, Ch.J.: Is he a party to this suit? That is what I want to know.

Mr. Ehrmann: No, he is not.

McCarthy, DJ.: Why, I see his affidavit under oath. He says the suit was brought on behalf of the corporation.

Mr. Ehrmann: That is right. However, I would suggest even this—perhaps to clarify my own thinking. Although this is a suit by the corporation and one of the other partners is here, if it was Mr. Chernock himself, being the same man who had been convicted in the State Court and he brought this bill, he would be entitled to maintain it. Now what he is asking is, that this prosecution under an unconstitutional statute be stopped. It makes no difference that he was convicted before. That is one of the reasons he is here.

McCarthy, DJ.: Assume, for example, a corporation was named under that mala prohibita statute and criminal

proceedings were had in the Springfield Court, and assume that this gentleman was prosecuted: is it your contention that he would be out of court in this proceeding?

Mr. Ehrmann: No, indeed. He would be entitled to bring these proceedings just the same.

McCarthy, DJ.: As a plaintiff?

Mr. Ehrmann: Yes. It is to restrain further prosecution [fol. 151] that he brings this bill; and that is the case in a number of these leading cases. That is why they go to the United States Court. They don't want to be continually humiliated.

McCarthy, DJ.: What was the proceeding in the State Court?

Mr. Ehrmann: Mr. Elcock can answer that.

Mr. Elcock: It is in the stipulation, your Honor, which was filed by Mr. Ehrmann a few moments ago.

McCarthy, DJ.: No, no, I mean in connection with the disposition of that case, that civil proceeding?

Mr. Elcock: It is in the stipulation. You will find it in there.

Mr. Ehrmann: That civil litigation in the State Court is covered in the stipulation. It was an attempt to have a State injunction until the prosecution of Mr. Chernock would be completed, and that was completed and the bill was dismissed, and that case is also out.

Q. In answer to questions put by Mr. Ehrmann, you stated that you were the only kosher super market in the area and the nearest kosher super market to you was in Hartford, Connecticut; is that right?

A. Right.

Q. Are there any markets other than kosher super markets that might sell kosher foods in that general area?

[fol. 152] A. No, there isn't any other kosher super market, but there are a lot that sell kosher meats and kosher poultry in that area.

Q. Is there any other kosher super market in the area at all?

A. Meat markets, there are.

Q. There are?

A. Yes.

Q. Are they open on Sunday?
A. Yes, they are.

Magruder, Ch.J.: All day Sunday?
The Witness: Yes.
Magruder, Ch.J.: You say they are open on Sunday?
The Witness: They are. They are all open.
McCarthy, DJ.: You mean, these other kosher markets are open all day Sunday?
The Witness: Yes, they are. The markets in delicatessen stores, they are open on Sunday.
McCarthy, DJ.: In competition with the Crown Kosher Market?
The Witness: They are.
Magruder, DJ.: There is an exception in the statute, that says, they shall not prohibit "the selling or delivering of kosher meat by any person, who, according to his religious belief, observes Saturday as the Lord's Day". That is not limited, there is no limit on time there; that is limited [fol. 153] to the sale of kosher meat alone.
Mr. Ehrmann: That exception does not admit the opening of the store, and how they can sell it without opening the store, your Honor, I don't know. It doesn't permit the opening of a store.
Mr. Elcock: Well, now, that is what Mr. Ehrmann says. May I point out in my motion to dismiss, your Honors, this contention is discussed. That is a question of law this Court will be called upon to decide.
Magruder, Ch.J.: If it is not correct, then what is the difficulty about staying open all day Sunday?
Mr. Elcock: No difficulty, your Honor, whatsoever.
Magruder, Ch.J.: Then what is the shouting about?
Mr. Elcock: The difficulty is, that he is not restraining his activities in business between himself and the person who is in the same religious persuasion as well.
Magruder, Ch.J.: I don't see anything there. "The selling or delivering of kosher meats"—that is the exception.
Mr. Elcock: Look at the next sentence, your Honor. That is the one to which I direct attention.
Magruder, Ch.J.: "Or the keeping open of his shop on the Lord's Day for the sale of kosher meats".

Mr. Elcock: The next sentence.

Magruder, Ch.J.: "Between the hours of 6 o'clock and [fol. 154] 10 o'clock in the forenoon. Nor shall it prohibit the performing of secular business."

Mr. Elcock: Perhaps I can clarify it by calling attention to the statute and this Chernock case in the Mass. Court. The next sentence says:

> "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby."

Magruder, Ch.J.: Yes.

Mr. Elcock: Now, as we contend, this particular shop does not limit itself to sales to persons who are similarly situated in respect to the seventh day. They are open to the general public.

Magruder, Ch.J.: That does not prohibit the performing of secular business by any person who is an Orthodox Jew.

Mr. Elcock: But the difficulty is this, your Honor. Chapter 136 would prohibit someone else from coming into a store and buying, so these people would be engaging in an illegal activity by carrying on business with one who had no such exemption.

Magruder, Ch.J.: I don't see how you can read that into the statute. Where is Chapter 136?

[fol. 155] Mr. Elcock: Well, your Honor, the Has case, the gift case, says you would violate the law if you opened a gift shop generally to anyone; and that is what Mr. Ehrmann has pointed out. If this particular shop is open only for purposes of a man carrying on his business who is a member of the Orthodox faith, then there is no problem; but if that gentleman purports to deal with others who are not in that similar position who can make contracts of sale, then the other persons are violating the law, and this exception allows him to open a shop provided he doesn't disturb others, and to the extent that he is soliciting the commission of a crime by some sales to a person not

within the exemption of the statute, the Has case says of course you can open your shop generally; but where these people claim they can open it for the general purpose of taking care of their religious customers, to that extent I don't see anything here, nor do I see any advance cases I have found or Mr. Ehrmann has found, that prohibits that. People purport to say this sentence of the statute means nothing. Let me call the Court's attention to the Chernock case under which he was prosecuted just a short time ago in Massachusetts.

McCarthy, DJ.: Isn't your position, if he could open that store for the sale of kosher meat to people of the Orthodox faith, he could sell all the Jews? Is that right?

Mr. Elcock: I would say that could be so, your Honor.

Woodbury, DJ.: But he couldn't sell to Gentiles?

[fol. 156] Mr. Elcock: No, no, your Honor.

Woodbury, DJ.: The reason for that they say is, it is not a disturbance to others to sell those of his own faith, but it would be to sell to people of other faiths.

Mr. Elcock: Yes, your Honor. Now I may be wrong on it because there is no Massachusetts case.

Woodbury, DJ.: I think that is a strange interpretation of the statute.

Mr. Elcock: Because otherwise the wording of the statute would mean nothing. And I would call the Court's attention again to the Chernock case involving the prosecution of this gentleman, and when the exceptions came up the Court said this specifically in this case:

> "It is apparent that the facts show violations of Section 5 and do not bring the defendant within the limitations provided by Section 6, as amended, namely, that Section 5 shall not prohibit 'the selling (or delivering) of kosher meats by any person who, according to his religious belief, observes Saturday as the Lord's Day by closing his place of business during the day until 6 o'clock in the afternoon or the keeping open of the shop on the Lord's Day for the sale of kosher meat . . ."

Woodbury, CJ.: That is talking about the storekeeper [fol. 157] there; it is not talking about the purchaser.

Mr. Elcock: That is right. The storekeeper is prosecuted. He could not fall within the exceptions. They did not say the exceptions did not exist. They admit the exceptions are there. They said the trouble here was this gentleman tried to sell to everybody, and the statute says he cannot disturb anybody else in their business because of his sales. They specifically allow him to carry on activities of that nature; and to go beyond and say they may engage in all business would be an undue hardship on all people. This gentleman is saying how much business he does on Sunday. There is no difficulty doing business on Sunday if no one else can open up.

Mr. Ehrmann: Are you through?

Mr. Elcock: No.

Q. Now, then, Mr. Chernock, in your super market, you say you are the only one of the kind. The type you have described is one where you sell only kosher foods; is that right?

A. Yes.

Q. Everything you sell is kosher?

A. With the exception of a few items, groceries that are not strictly kosher. Our meats, our delicatessen, are strictly kosher under rabbinical supervision. We could not carry any other kinds.

Q. You carry all kosher foods but in addition to kosher foods you carry other foods?

A. Very few items in the grocery that are not; crackers [fol. 158] and things like that are not.

Q. Now I have heard no definition here of what you consider to be kosher foods. To some extent you have discussed kosher foods which may have been blessed by the Rabbi and are under the supervision of the Rabbi. Is that correct?

A. That is correct.

Q. What are these other kosher foods to which you have reference?

A. Well, Manishewitz products are strictly kosher items. There is crackers of different kinds that are strictly under rabbinical supervision.

Q. Can you name some more items?

A. There is—the names of the—there's quite a few items.

Q. Are any of them put out under a trade-name other than a kosher trade-name?

A. There is a "U" on some of them and a star on others under the kind they put out as kosher. I don't believe they put out any other kind.

Q. Are there any products in your store which you would classify as kosher products which might be sold in another store that did not purport to sell kosher meats and kosher foods?

A. I wouldn't really say that. I don't know.

Q. You don't know?

A. It could be.

[fol. 159] Q. Well, do you know what kosher foods are?

A. Of course I do.

Q. Do you know of any kosher foods then that you could buy in the A&P?

A. Do I know of any?

Q. Yes.

A. There might be some, but I don't know. I seldom go in there and I seldom shop there or look at their prices. I really don't know.

Q. Ever since you have been in business?

A. Honestly, I don't know.

Q. Have you ever been in any other super market that is a kosher market?

A. At times I have been, but I never happened to look.

Q. Name one of them.

A. That I have been in?

Q. Yes.

A. We have the Springfield Market.

Q. Is that a super market?

A. No, it isn't.

Q. How often were you in there?

A. Once or twice, a couple of years ago.

Q. You haven't been in another super market for a couple of years?

A. Not to my knowledge.

[fol. 160] Q. Do you have anything to do with the serving of foods in your store?

A. I just buy the meats. We have a man that buys groceries.

Q. Do you know anything about the purchase of groceries?

A. Not too much.

Q. You are the general manager of the store?

A. That is right; but he is just in charge, he buys the groceries.

Q. So you have nothing to do with the grocery part of the store?

A. Not to do the buying, no.

Q. Do you have any supervision of the sales in connection with groceries?

A. Not over the bills, no, sir.

Q. How did you get these figures then in connection with the groceries?

A. We have the registers rung every day. After the day is over, every item is rung separate: Meats separate, groceries separate, bakeries separate, fruit and vegetables separate. They are all in different divisions.

Q. Do you have anything to do with the figures relating to groceries?

A. Yes, I have to have the figures because—

Q. Do you know who the suppliers of your groceries are?

A. We buy them direct from Boston. It is called the Market Basket Stores.

[fol. 161] Q. Do you buy any products from the National Biscuit Company?

A. We do, yes.

Q. Are any of them kosher products?

A. Some of them are, some are not.

Q. Are they labeled kosher?

A. They are labeled with a "U" on some of them.

Q. Is it possible that you could have some products of the National Biscuit Company on your shelves that you would consider kosher and yet there would be no designation on them?

A. That is possible.

Q. Now, is that what happens in your store in connection with some products?

A. What do you mean does it happen?

Q. Are there products of the National Biscuit Company which are kosher?

A. I don't know exactly which ones, whether there is a "U" there or not. I couldn't tell you exactly which ones they are.

Q. Is it fair to say that many products which you would classify as kosher are products that are being purchased in other stores that are not kosher stores?

A. That is possible.

Q. Is it probable?

A. Possible.

Q. Is it probable?

A. I don't know. It could be, yes, I imagine.

[fol. 162] Q. How long have you been in the grocery business?

A. The grocery business I haven't been long. I've been in the butcher business all my life.

Q. How long ago?

A. In the grocery business I only came up since I opened the super market.

Q. Did you read over this complaint before you signed it?

A. Yes, I did.

Q. Do you recall anything in this complaint about the duties of a rabbi?

A. Rabbi? Yes.

Q. And do you recall anything in here about the fact that the rabbis cannot fulfill their religious duties to their congregations making food prepared in accordance with their religion at times when they are able to purchase them?

A. There were times like that.

Q. Well, when you signed this affidavit, did you read over the material? Are you familiar with this allegation about—

Magruder, Ch.J.: What is the page?

Mr. Elcock: I am calling attention to paragraph (c) on pages 6 and 7 of the petition:

> "Plaintiff Rabbi Moses D. Sheinkopf and the other rabbis cannot fulfill their religious duties to their congregations in making foods prepared in accordance

with their religion at times when they are able to pur-
[fol. 163] chase them if available."

Q. Do you recall signing that?

A. Yes, I do.

Q. What duties of the Rabbi would be not carried out if you could open on Sundays?

A. What duty would be what?

Q. What duty does the Rabbi do on Sunday that he could not perform if you were limited to, say, the hours of 6 to 10 on Sunday morning?

A. What could he do?

Q. Well, you said in here if you are limited to Sunday opening—

A. I didn't talk about the Rabbi. I was talking about being able to open.

Q. You were talking about the Rabbi. Let me ask you this. What does the Rabbi do on Sunday in your store?

A. What does he do in that store on Sunday?

Q. Yes.

A. When he comes in?

Q. Yes.

A. He washes my meats for me.

Q. Does he do that on Sunday?

A. He doesn't have to do it on Sunday. Now he does it on Friday.

Q. On Friday.

A. That's right.

[fol. 164] Q. He doesn't do it on Sunday at all?

A. He doesn't have to.

Q. Why not?

A. Because we are allowed three days, from Friday to Monday. We are allowed 72 hours.

Q. So, when Mr. Ehrmann talked about coming in before 6 o'clock on Sunday morning to wash the meat, that doesn't happen, does it?

A. He would have to close up. He would have to.

Q. He actually doesn't have to wash the meat on Sunday at all; is that right?

A. He has to do it before 72 hours. Let me explain to you. When the meat comes in Friday, we have three days

to do business with it. If they close me up, he would have to come in and do it.

Q. Well, if it is washed on Friday night you could sell it on Sunday, couldn't you?

A. Yes.

Q. And they do wash it on Friday night?

A. They do if it has to be.

Q. You get the meat in on Friday?

A. We get it on Friday. If it is killed Thursday, it has to be done Sunday morning because that is when we open.

Q. So, so far as the Rabbi is concerned, in your store the Rabbi does not perform any religious function on Sunday? [fol. 165] A. Yes, he does.

Q. What does he do?

A. He has to wash the meat when we have to have it.

McCarthy, DJ.: Just a couple of minutes ago didn't you say he didn't come in Sundays?

The Witness: No, I said, when the meat is killed Thursday we do it on Friday, because we are allowed 72 hours; but if we are not going to be able to sell it and meat will be left over, we will have to dispose of it and he will have to come in and do it. They are only allowed 72 hours.

Q. If you could open up on Sunday mornings between the hours of 6 and 10—there's no question on that. You can open up in those hours.

A. There's no what?

Q. You can open up between 6 and 10 Sunday mornings anyway, can't you?

A. To sell what?

Q. To sell kosher meat.

A. Well, that's what the statute says I can.

Q. You don't have to have a rabbi come in and wash meat on that day, do you?

A. Yes, he would have to come in.

Q. Didn't you just say he could do it on Friday?

A. Yes, he could do it on Friday. That's right.

[fol. 166] Q. How many super markets in the Springfield area are open on Sunday?

A. Super markets?

Q. Yes.

A. None, to my knowledge.

Q. None?

A. To my knowledge.

Q. How about yours?

A. I am.

Q. You are the only one open?

A. That's right.

Q. Might that explain why you do so much business on Sunday?

A. Why do I?

Q. You claim the only business you get that is substantial is that which comes in on Sunday, do you not?

A. Because we are closed Friday, we don't do business on Saturday, and we never did any business on Monday.

Q. Now how much of the business that you do on Sunday is done as the result of purchases by persons who are not Orthodox Jews?

A. I don't believe there is—very, very little.

Q. Do you know your customers?

A. I know most of them, yes, I do.

Q. They are the customers that are listed on this petition here?

A. Do you want me to look at the names?

[fol. 167] Q. Pardon me?

A. Do you want me to look at them?

Q. No, no, do you know them?

A. Those that signed the petition in my store, I know most of them.

Q. You know most of them?

A. Most of them.

Q. Do you have here any list of your customers?

A. Have I? I haven't got one, no.

Q. Do you know a Harold Machlin of 63 West Street, Springfield, Mass.?

A. Machlin? Howard Machlin, I know him, yes.

Q. Do you know him personally?

A. Howard Machlin I know.

Q. When was the last time he was in your store on Sunday?

A. When was Howard Machlin in my store? I couldn't tell you exactly which Sunday.

Q. Do you know any persons other than those listed here who might be your customers who were not Orthodox Jews?

A. Yes, there could be some.

Q. There could be some?

A. Yes.

Q. Do you see any in the court room?

A. Yes.

Q. Who are they?

[fol. 168] A. Not a customer, but he comes in. Mr. Ryan.

Q. Do you make sales to persons, to anybody who is in this room?

A. We don't discriminate. It would be bad business not to.

Q. Now you testified that on Sunday you have difficulty because of lack of employees in the store. How many do you have on Sunday?

A. How many what?

Q. How many employees did you say you had?

A. Six.

Q. Six. Does that include the people running the grocery department?

A. No, they are separate.

Q. They are separate. How many other separate ones that you did not mention do you have in there?

A. How many all around, you mean?

Q. Yes.

A. Oh, there are—you were talking about butchers then?

Q. No, I'm talking all told.

A. All around we have six, seven, nine, eleven, twelve.

Q. Twelve. You said six employees in the store?

A. I thought you asked me the meat department. You asked me how many butchers, and I said six. You didn't ask me how many employees in the store.

Q. You have six employees in the butcher department?

[fol. 169] A. That is correct.

Q. Now, again, you have said the store is closed from sundown on Friday until Sunday morning. Is that right?

A. That is correct.

Q. Why don't you open up at sundown on Saturday?

A. Well, because that wouldn't be very practicable. In the summertime you cannot open before 9 o'clock. That is the very time we close.

Q. How about wintertime?

A. Wintertime we could open before, yes; but it would be very, very unpractical.

Q. The only reason you don't do it is because you don't want to; is that correct?

A. It isn't that I don't want to. We have never done that, and we always do it the other way.

Q. As far as you know, if you wanted to open on any Saturday night after sundown, you could be open without violating your religious duties; is that correct?

A. That is correct.

Q. You have some figures here on gross sales. Have you figures on net sales?

A. No, I don't.

Q. So you don't know whether you made a profit or a loss on these days?

A. Yes, I do know.

[fol. 170] Q. How would you know?

A. I have good reason to know.

Q. You can't tell from looking at this book?

A. I can't tell from that one, no.

Q. So this is just a catchall book?

A. This is the business we do every single day.

Woodbury, CJ.: Those are daily gross sales?

The Witness: Those are daily, that is correct.

Q. How far back did this go? Do you know?

A. '57 that is.

Mr. Ehrmann: What was that date?

Woodbury, CJ.: '57, I think he said.

Mr. Elcock: July of '57.

Q. When did you open the super market?

A. Oh, August, 1953.

Q. Have you operated it on every Sunday since then?

A. Every day Sunday.

Q. You have no experience at all, then, as to what the business would be if you had operated on days other than Sunday?

A. That is correct.

Q. And you don't know what your profit is on Sunday?

A. No more than we make a profit. It's understood.

Q. You stated you were the gentleman who was prosecuted in the State Court.

A. Was I? Yes.

[fol. 171] Q. Yes. As a result, what led up to your prosecution, what was the situation involved? Do you recall?

A. I don't.

Q. Do you know who made the sales?

A. Who made them?

Q. Yes.

Magruder, Ch.J.: To whom you made them?

A. To whom? You mean the police? What do you mean?

Q. Did you make a sale as a result of which—

A. On a Sunday, you mean?

Q. On a Sunday.

A. I don't think it was me personally. One of my employees, yes.

Q. One of your employees did?

A. Yes.

Q. And you were prosecuted?

A. That is right.

Q. Do you know to whom he made the sale?

A. Offhand I don't remember. I mean, I don't know.

Q. Do you know whether it was to an Orthodox Jew or not—your sale?

A. No.

Mr. Elcock: No further questions.

McCarthy, DJ.: Mr. Witness, may I ask you to turn back to that book of yours and tell me what the receipts were [fol. 172] for the two weeks previous to May 1st, 1958, on Sunday?

Mr. Ehrmann: Let me help you.

The Witness: If it is a holiday week, we were only open three days.

Mr. Ehrmann: Just read May 13.

McCarthy, DJ.: No, I have asked previous to May 1st.

Mr. Ehrmann: This is April 13th [pointing]. Read this week and the next one.

The Witness: April 13th, on Sunday, we did $3,890.30.

McCarthy, DJ.: Now the following Sunday.

The Witness: The following Sunday, $3,365.

McCarthy, DJ.: Now on the following Sunday.

The Witness: $3,390.

McCarthy, DJ.: What date was that?

The Witness: The 27th.

McCarthy, DJ.: Now let me have the receipts for the next three weeks in May, after May 1st.

Mr. Ehrmann: Those are just Sunday receipts, if your Honor please?

McCarthy, DJ.: That is all I am asking.

The Witness: May 4th, $3,983.

McCarthy, DJ.: The next after that?

The Witness: $3,236.

McCarthy, DJ.: And the next after that?

The Witness: $3,807.

[fol. 173] McCarthy, DJ.: Those are the three weeks after this suit was brought. The suit was brought May 1st. And those are the figures for those three Sundays.

Magruder, Ch.J.: There may have been some period when you kept closed on Sunday, was there not?

The Witness: Yes, sir.

Magruder, Ch.J.: Because of the threat of prosecution.

The Witness: No, I never closed up.

Magruder, Ch.J.: You never did?

The Witness: No, I did not.

Magruder, Ch.J.: I thought Mr. Ehrmann said they made an agreement they would not enforce the statute against you pending this litigation, and I thought there must be some period when you closed per force of the threat.

The Witness: No, I never was.

Magruder, Ch.J.: You never closed?

The Witness: No.

Mr. Ryan: May it please your Honor, there was an injunction filed, a civil injunction in the Superior Court for Hampden County.

McCarthy, DJ.: Will you let us have your name?

Mr. Ryan: Yes. I am the City Solicitor for Springfield, Matthew Ryan.

When this case went to the Supreme Court, this criminal complaint, during the interim the attorney for the defen-

[fol. 174] dant Chernock filed an injunction, a preliminary injunction in the Superior Court for Hampden County, which was dismissed on November 3d by Judge O'Brien.

Woodbury, Ch.J.: That was after the Chernock case was decided.

Mr. Ryan: That was a long time after the decision of the Supreme Court—

Mr. Ehrmann: It was dismissed a long time after. The stipulation sets it out.

Mr. Ryan: That preliminary injunction was filed on June 18, 1954, I believe.

Mr. Ehrmann: Yes. And the injunction that is being discussed here was the injunction restraining further complaints against Mr. Chernock until the Massachusetts case had been terminated.

Woodbury, CJ.: That is as I understand it.

Mr. Ehrmann: Yes, that case was terminated quite a while ago but apparently the Chief of Police thought the injunction was still outstanding, whereas it had become moot, and then after that it was dismissed.

No more questions, Mr. Chernock.

May it please the Court, my brother raised a novel point as far as he is concerned, in contending that the sentence in Section 6 of Chapter 136 reading, "Nor shall it prohibit the performing of secular business and labor on the Lord's Day by any person who conscientiously believes that the [fol. 175] 7th day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby", has some bearing on keeping open a shop. That has been decided by the Massachusetts Court. *Commonwealth* v. *Has,* the case which has been so frequently mentioned here, held that that section did not apply to keeping open a shop. Then, later on, a Jewish butcher who kept and sold only kosher meat was prosecuted for keeping open his butcher shop on Sunday. He pleaded that he closed on Saturday. He sold only kosher meats. He closed on Saturday, according to his religious belief, and he pleaded this very language I have been talking about; and the Court —this is *Commonwealth* v. *Starr,* 144 Mass. 359—on page 361 ruled—

"The evidence shows that the defendant, who is a Hebrew, kept open his shop on the Lord's Day, for the purpose of selling meat to Hebrews. The Court correctly held that the facts that he was a Hebrew, who conscientiously believed that the seventh day of the week ought to be observed as the Sabbath, and that he actually refrained from secular business on that day, was immaterial. This point was fully considered and decided in *Commonwealth* v. *Has*, 122 Mass. 40.

The Court also correctly held that it was not competent for the defendant to prove that he kept open his shop for the sole purpose of selling meat to [fol. 176] Hebrews, and that this was a work of necessity or charity."

And the Court held that that was decided in *Commonwealth* v. *Dextra*, 143 Mass. 28, adversely to the claimant. So that those points have been decided.

McCarthy, DJ.: What happened in that case?

Mr. Ehrmann: The conviction stood.

McCarthy, DJ.: That is right.

Mr. Ehrmann: He sold nothing but kosher meat, and the conviction stood.

McCarthy, DJ.: Did he sell kosher meat to Orthodox Jews?

Mr. Ehrmann: It doesn't say they were Orthodox. It says he sold kosher meat to Hebrews.

McCarthy, DJ.: That is right.

Mr. Erhmann: So that this is no longer a matter for us to consider because the Massachusetts Supreme Court has already construed this statute. We may think it was wrong but it has construed it, and that phrase has nothing whatever to do with keeping a shop open. The only language in the entire section that talks about a shop open and permits a shop to be kept open is the keeping open of a shop on the Lord's Day for the sale of kosher meat between the hours of 6 and 10 o'clock in the forenoon provided he closes on Saturday. That is all there is. And this discussion we have had indicating that an Orthodox [fol. 177] Jew could sell meat all day if he wanted to just

isn't the law. Perhaps it should be, but under the construction we have in Massachusetts it just isn't the law. That is all he concluded or else he wouldn't be here.

McCarthy, DJ.: Do you agree to that, Mr. Elcock?

Mr. Elcock: No, your Honor, I don't. If I could express my opinion on it, the prosecutions were ones where the sales were not limited, and that was the precise problem in this super market case.

Mr. Ehrmann: Also it sold after 10 o'clock. The case rested partly on *Commonwealth* v. *Has*, which had nothing to do with selling kosher meats. Neither did the case in 144 have anything to do with selling kosher meats.

Now, in the stipulation it was agreed that we may show to the Court a pamphlet issued by the Union of Orthodox Jewish Congregations of America, Rabbinical Council of American Jews; and the only reason why I am offering this to the Court as a guide to the Court, is simply to indicate how very complex these laws of Kosher are. To many of us they seem very simple. Why can't you do this? Why can't you do that? How these Orthodox co-Religionists of mine can cling to their devotion and all the difficulties that they have in their diet, as well as the difficulties engendered by Sunday, is beyond me because it just expresses a devotion to their faith which is superhuman; but you will see from that the things that are required before [fol. 178] they can eat food according to their religious customs. That is the sole purpose of introducing it. It has no bearing on this case except as background material.

Magruder, Ch.J.: Is that all?

Mr. Ehrmann: That is all we have, thank you.

Mr. Elcock: That is all.

Magruder, Ch.J.: The Court will take the matter under advisement.

Mr. Ehrmann, do you want to file any brief?

Mr. Ehrmann: We just got a brief, we just received a brief and haven't opened it.

Magruder, Ch.J.: If you want to file a brief, do it by tomorrow.

Mr. Ehrmann: Yes, thank you.

McCarthy, DJ.: Do you want to file a reply brief?

Mr. Elcock: I don't think so, your Honor. There is adequate material here, and I don't think in the brief there are points which haven't been raised in evidence. I think everything has already been covered.

[The Court recessed at 3:30 p.m.]

[fol. 179] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 180]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant.

Before Magruder and Woodbury, Circuit Judges, and McCarthy, District Judge.

Herbert B. Ehrmann, Samuel Markell, Edward L. LaVine, Goulston & Storrs, Irving S. Ribicoff, David Kotkin, Ribicoff and Kotkin, Samuel L. Fein, Fein, Cavanaugh & Kimball, for Plaintiffs.

S. Thomas Martinelli, Assistant City Solicitor; Matthew J. Ryan, Jr., City Solicitor; John J. O'Connor, Assistant City Solicitor, for Defendant.

Joseph H. Elcock, Jr., Assistant Attorney General; Edward A. McCormack, Jr., Attorney General, for the Commonwealth of Massachusetts.

Leo Pfeffer, for the International Religious Liberty Association; Howard S. Whiteside, for the Southern New England Conference of the Seventh Day Adventists; Henry M. Leen, for the Archdiocesan Council of Catholic Men; Herbert S. Avery, for the Lord's Day League of New England,

Amici Curiae.

[fol. 181]

OPINION OF THE COURT—May 18, 1959

Magruder, Circuit Judge. It is always an unpleasant task for a lower federal court to sit in review upon the constitutionality of state legislation, sometimes a three-judge district court can find no escape from doing that, under 28 U.S.C. §§ 1331, 1343, 2281 and 2284. We believe the present to be such a case.

The attack which we have to consider is upon the validity, under the Federal Constitution, of the modern version of what started as one of the famous "blue laws" enacted by the Great and General Court of Massachusetts in colonial days. Specifically, we refer to the so-called "Lord's day" statute, still on the books in Massachusetts. So far as we are aware, the Supreme Judicial Court has had no occasion to pass on the validity of this statute under the Federal Constitution, though that court has, rather gingerly and briefly, upheld the statute against attacks based upon the state constitution. See *Commonwealth* v. *Has*, 122 Mass. 40 (1877); Commonwealth v. Chernock, 336 Mass. 384 (1957).

The Federal complaint now before us seeks a declaration that certain provisions of the "Lord's day" statute of Massachusetts are unconstitutional, as applied to the plaintiffs. Preliminary and final injunctions restraining the defendant, the Chief of Police of the City of Springfield, from enforcing against the plaintiffs the criminal provisions of the law were asked for. A three-judge court was designated to hear the suit, pursuant to the provisions of 28 U.S.C. §§ 2281 and 2284. The motion for a preliminary injunction was not pressed, after the parties had informally agreed that the plaintiffs would not be prosecuted until after decision of this case. The defendant filed a motion to dismiss, which was consolidated with the hearing on the merits before this court.

[fol. 182] Counsel for the Commonwealth has appeared to oppose the relief prayed, and by leave of court consolidated briefs were filed on behalf of two pairs of amici curiae, The Lord's Day League of New England and the Archdiocesan Council of Catholic Men, arguing that the statute should be upheld, and the International Religious Liberty Association, together with the Southern New England Conference of Seventh Day Adventists, urging that the statute is unconstitutional.

Joined as plaintiffs were Crown Kosher Super Market of Mass., Inc., a corporation operating a kosher supermarket in Springfield, Massachusetts, three named customers thereof, suing on behalf of themselves and others similarly situated, and a rabbi suing on behalf of himself and other rabbi similarly situated.

Most of the facts were stipulated by the parties, but some additional oral and documentary evidence was presented by the plaintiffs at the hearing before us.

The corporate plaintiff's supermarket (hereinafter called the Crown Market) offers for sale all categories of food ("one stop shopping"); all of its meats and meat products are kosher, and something like 95 per cent of the rest of its stock is kosher. The Crown Market is the only store of this kind in the area of Springfield; apparently it is the

only one within 26 miles or more.[1] But Springfield has several kosher butcher shops and some delicatessen shops and supermarkets which sell certain kosher products.

The four officers and stockholders and the six directors of the corporate plaintiff are all adherents of the Orthodox Jewish faith, who duly observe the Jewish Sabbath, from [fol. 183] sundown Friday to sundown Saturday. A very substantial percentage of the corporate plaintiff's customers are Orthodox Jews, and most of the others are Conservative Jews who observe the Jewish Sabbath.

The due observance of the Jewish Sabbath requires total abstinence from business and work of even the most trivial sort. Any riding in automobiles or other conveyances and walking extraordinary distances are forbidden. With particular reference to this case, the religious belief of the officers, directors and stockholders of the corporate plaintiff completely precludes the operation of the store on the Jewish Sabbath, since that would be doing business vicariously and causing others to work on the Sabbath. The large majority of Crown Market's customers, who share these beliefs, may not shop on the Sabbath, nor may they cook. Preparation for meals during the 24 hours of the Jewish Sabbath, and especially for the traditional family feast on Friday night, consumes most of the daylight hours on Friday.

It follows that the Crown Market (like other kosher stores) is not open for business between sundown Friday

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[1] The testimony that the nearest similar store was in Hartford, Connecticut (about 26 miles to the south), was not rebutted, and is corroborated by the fact that the list of customers attached to the complaint contains names of persons coming from the following towns in addition to Springfield (approximate distance and direction from Springfield are noted parenthetically):

Brattleboro, Vt. (60 mi. N)
Pittsfield, Mass. (53 mi. WNW)
Athol, Mass. (50 mi. NE)
Turners Falls, Mass. (43 mi. NNE)
Greenfield, Mass. (39 mi. N)
Ware, Mass. (25 mi. ENE)
Holyoke, Mass. (12 mi. NNE)
Westfield, Mass. (9 mi. W)
Enfield, Conn. (9 mi. S)
Agawam, Mass. (4 mi. SSW)
Longmeadow, Mass. (3 mi. S)
W. Springfield, Mass. (3 mi. W)

and sundown Saturday, and on thirteen Jewish holidays each year. Even if the store were open on Saturday, the great majority of its patrons could not take advantage of it, just as they cannot take advantage of the other stores which are open Friday night and Saturday and sell some kosher food. Business considerations make operation on Saturday night impracticable. If, after sundown, the store were prepared for business (for instance, by cutting meat) and were then opened, few hours would remain before a suitable closing time; the twelve store employees (six of whom are butchers) would demand extra wages for their trouble, and most customers would find it inconvenient, if [fol. 184] not impossible, to shop during those night hours, especially those who would have to travel significant distances starting after sundown.

But it is common knowledge that the normal pattern of a grocery store's business shows a gradual increase in volume, from very little business on Monday to somewhat more during the day of Friday. The stores are jammed and a vast amount of business is done on Friday evening and Saturday. Since the Orthodox and Sabbath-observing Conservative Jews, such as the customers of the corporate plaintiff, cannot shop on Friday night or Saturday, and they have spent the Sabbath as a day of rest or religious celebration and family communion, Sunday is the only day which has for them the advantages as a shopping day that Saturday has for the majority of the people.

Under these circumstances, it is not surprising that more than one third of Crown Market's gross sales each week are made on Sunday. It would not be practicable for Crown Market to sell only kosher meat from 6 A.M. to 10 A.M. on Sunday, as permitted by law, for economic reasons similar to those preventing operations on Saturday night after sundown. The few sales would not justify the great expense.

The Crown Market is open for business from 8 A.M. to 6 P.M. every Sunday, and has been open every Sunday (excluding Jewish Holidays) since it was established August 18, 1953. It thus has been and is violating the statute, the constitutionality of which is being attacked in this proceeding. The manager of the Crown Market (who is also the corporate plaintiff's president and owns 50 percent of the

stock thereof) was convicted of violation of the challenged provisions of the Lord's day law in the Massachusetts state court. His exceptions in that trial, which questioned the constitutionality of the law under the state constitution but raised no federal constitutional issue, were overruled [fol. 185] by the Supreme Judicial Court. *Commonwealth* v. *Chernock*, supra, 336 Mass. 384 (1957). Even if the defendant had pleaded res judicata (which he has not, see Rule 8(c), F.R.C.P.), it seems obvious enough that the corporate plaintiff is not bound by *Commonwealth* v. *Chernock*, nor is any of the individual plaintiffs.

The defendant threatens to enforce the law to the full extent of his authority. Thus it must be taken that he will institute repeated criminal prosecutions against the corporate plaintiff, its four officers and stockholders, and its six directors and twelve employees, for each violation, that is, for each Sunday on which Crown Market is open for business.

Two of the three named customer-plaintiffs are residents of Springfield and the third is a resident of Turners Falls, 43 miles to the north. All are Orthodox Jews who are regular customers of the corporate plaintiff's store. These three customers adequately represent a class of Orthodox Jewish people of the area served by the corporate plaintiff's store; they seek to enforce, by obtaining a common relief, their several rights which depend, however, on common questions of law and fact within the meaning of Rule 23(a)(3), F.R.C.P.

The named plaintiff-rabbi is the Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and is the president of the Massachusetts Council of Rabbis. He has been duly authorized by the latter organization to represent it in the prosecution of this action. Besides his religious duties as leader and teacher of his congregation, this rabbi has the duty (which he may and in fact does discharge through an inspector appointed by him) of inspecting Kosher Markets and butcher shops daily except on the Jewish Sabbath to ensure compliance with Jewish dietary laws. The inspector comes to the Crown Market at 8 A.M. on Sunday for the washing of any meat from animals slaughtered on the previous Thursday which is on

hand. Among the dietary rules enforced is that fresh meat [fol. 186] must be rewashed every 72 hours, that only meats and seafood of certain kinds and quality may be eaten, and that meat and dairy products must not be commingled, even by the use of the same implements for both. We think that the plaintiff-rabbi adequately represents a class, and that this class seeks to enforce by a common relief certain common rights and certain several rights which depend upon common questions of law and fact within the meaning of Rule 23(a)(1) and (3), F.R.C.P.

Preliminarily the defendant relies upon a point of equity jurisdiction based upon the justifiable reluctance of federal courts of equity to interfere by way of injunction with the operation of a state criminal statute. As stated in *Spielman Motor Sales Co., Inc.*, v. *Dodge*, 295 U.S. 89, 95 (1935), "there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." In *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943), in which similar language occurs, the actual decision was that the bill should be dismissed for "want of equity", since an injunction against enforcement of the ordinance was unnecessary because, in parallel litigation, the Supreme Court had already adjudicated that the ordinance was unconstitutional. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

It would be nice if we could say to these plaintiffs, "Go ahead and violate the challenged statute, and urge your defense based upon federal constitutional grounds in the course of the state court proceeding." But the matter is not so simple as that. It seems clear, from the recent decision in Evers v. Dwyer, 358 U.S. 202 (1958), that when enforcement of a state criminal statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute unless and until its unconstitutionality has been finally adjudicated, a three-judge district court [fol. 187] may not decline as a matter of discretion to take jurisdiction of a suit to enjoin the operation of the statute. Furthermore, this argument by the defendant really relates only to the corporate plaintiff. Because there is an exception in the statute that permits persons situated as are the plaintiff-customers and the plaintiff-rabbis to perform "sec-

ular business and labor" on Sunday, these particular individual plaintiffs cannot, either by shopping at the corporate plaintiff's store or by inspecting it, or by any other act in the capacities in which they appear here, violate the Sunday law. It is evident that for them the *only* method by which they can vindicate the constitutional rights claimed is by obtaining equitable relief.

As stated in the complaint, the grounds for challenging the Sunday law are all founded upon the Fourteenth Amendment. Simply stated, these are: (1) That the Lord's Day law is a law respecting the establishment of religion and denying the free exercise of religion and hence is violative of the due process clause of the Fourteenth Amendment. See *Douglas* v. *City of Jeannette*, supra, 319 U.S. at 162; (2) that the statute deprives the corporate plaintiff of its property and the other plaintiffs of their liberty arbitrarily and therefore is a denial of due process of law guaranteed by the Fourteenth Amendment; and (3) that the statute denies the corporate plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. It can hardly be disputed that the corporate plaintiff has standing to assert the grounds numbered 2 and 3 *supra*, and that the individual plaintiffs have standing to assert the grounds numbered 1 and 2 *supra*. If we were required to go into the matter, which we are not now, we would be prepared to hold that the facts of this case bring it squarely within the exception to the Supreme Court's "rule of practice" forbidding one party to assert somebody else's con- [fol. 188] stitutional rights, so that all plaintiffs could argue all grounds. See *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Pearl Assurance Co., Ltd.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), aff'd 313 U.S. 549 (1941); *Bartels* v. *Iowa*, 262 U.S. 404, 410-11 (1923); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

It is clear that the first Sunday law, enacted in 1653, and the various modified versions thereof also enacted in the colonial period, had the religious purpose to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect. See Colonial Laws of Mass. 132-33, 134; Mass. Bay Province Acts 1692-93, c. 22; 1716-17, c. 13; 1727-28, c. 5; 1760-61,

c. 20. See also the codification of 1782, passed by the legislature assembled under the constitution of the Commonwealth of Massachusetts. Mass. Acts 1782, c. 23. These enactments were prior to the adoption of the Constitution of the United States and long before the adoption of the Fourteenth Amendment.

In enactments subsequent to the creation of the Federal Union, the Massachusetts legislature began to eliminate some provisions from the earlier prohibitory clauses of its Sunday laws. See Mass. Acts 1791, c. 58; R.S. 1836, c. 50.

In 1858 the legislature, apparently yielding to various pressure groups, commenced the practice of writing in various exceptions to the general prohibition against secular activities on the Lord's day, which has resulted in amendments by some seventy-odd different enactments.[2]

The result of all this is that the Sunday Law, as it now exists on the books, is an almost unbelievable hodgepodge. Chapter 136 of the Massachusetts General Laws, entitled [fol. 189] "Observance of the Lord's day", contains in §5 the general prohibition which defendant is threatening to apply to the plaintiffs: "Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars." (There is no doubt that the "Lord's day" as used in the statute means Sunday.) Then §6 and the succeeding sections contain miscellaneous exceptions and qualifications, none of which do these plaintiffs any good. One of such exceptions might have seemed as an original matter to be applicable to the corporate plaintiff. It is provided in one

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[2] Mass. Acts 1858, c. 151; 1881, c. 119; 1886, c. 82; 1887, c. 391; 1893, c. 41; 1895, c. 434; 1897, c. 389; 1900, c. 440; 1901, c. 80; 1902, c. 414; 1904 c. 460; 1906, c. 139; 1908, cc. 123, 126, 273, 333, 343, 354, 385, 537; 1909, cc. 420, 423; 1910, c. 327; 1911, c. 328; 1914, c. 757; 1916, c. 146; 1917, c. 207; 1918, c. 257; 1920, cc. 141, 240; 1922, c. 119; 1928, cc. 234, 406; 1929, c. 118; 1930, cc. 90, 143, 179; 1931, cc. 41, 71, 174, 176, 240, 275, 426; 1932, cc. 96, 105; 1933, cc. 150, 309; 1934, cc. 55, 63, 354; 1935, cc. 78, 104, 169; 1936, c. 129; 1937, c. 286; 1938, cc. 60, 143; 1943, c. 473; 1945, c. 575; 1946, cc. 207, 318; 1948, c. 119; 1949, c. 190; 1950, cc. 256, 322, 681; 1951, cc. 32, 504; 1954, cc. 132, 217; 1955, cc. 255, 304, 524, 742; 1956, cc. 11, 157, 212, 256.

part of §6: "Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby". But the Supreme Judicial Court has held, and of course that court's interpretation of the state statute is binding upon us, that this particular exception does not excuse the separate offense of keeping one's shop open on the Lord's day, although the defendant in conscience believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business on that day. *Commonwealth* v. *Has*, supra, 122 Mass. 40. To the same effect see *Commonwealth* v. *Kirshen*, 194, Mass. 151 (1907); *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Much is made by the defendant of the following extract from the opinion of the Supreme Judicial Court in *Commonwealth* v. *Has*, supra, 122 Mass. at 42:

> "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open [fol. 190] question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week

> may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

This description of the Massachusetts Sunday law as being merely a "day-of-rest" statute, enacted pursuant to the police power, is answered by an examination of the statute, particularly those numerous provisions which permit various activities on Sunday, which certainly are not "works of necessity and charity", at specified hours and places designed not to affront godly persons worshipping in their churches during the usual morning hours. Moreover, the exceptions, permitting a great variety of functions on Sunday, are not by §6 made conditional upon the observance of some other day in the week as a day of rest. In fact there is on the statute books a wholly separate requirement, Mass. G. L. c. 149 §48, imposing upon employers of labor the obligation to see to it that their employees are allowed "at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days." The characterization of the Sunday law as being merely a civil regulation providing for a "day of rest" seems to [fol. 191] have been an *ad hoc* improvisation in *Commonwealth* v. *Has*, supra, because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state constitution if the religious motivation of the statute were more explicitly avowed. At any rate, that characterization of the statute is contradicted by other pronouncements of the Supreme Judicial Court both before and after the date of the decision in *Commonwealth* v. *Has*. See, for instance, *Pearce* v. *Atwood*, 13 Mass. 324, 345-46 (1816); *Bennett* v. *Brooks*, 91 Mass. 118, 121 (1864); *Davis* v. *City of Somerville*, 128 Mass. 594, 596 (1880); *Commonwealth* v. *White*, 190 Mass. 578, 580-81 (1906). In the last-

named case, blissfully ignoring what was said in *Commonwealth* v. *Has*, the Supreme Judicial Court said:

"In construing this statute it is to be borne in mind that so far as material to the question before us, it is simply the continuation of a law which from a very early time in the history of the Colony has been constantly upon our statute books. It is one of a series of statutory provisions enacted to secure the proper observance of the Lord's day, as understood by our forefathers. Their idea of the Lord's day, the manner in which it should be spent, and the object of the system of statutes passed from time to time to secure its proper observance are set forth in the various preambles to those statutes. One of these is in the following language: 'Whereas it is the duty of all person, upon the Lord's Day, carefully to apply themselves, publickly and privately, to religion and piety, the prophanation of the Lord's Day is highly offensive to Almighty God, of evil example, and tends to the grief and disturbance of all pious and religiously disposed persons; therefore,' etc. See Prov. St. 1760-61, c. 20 §1; 4 Prov. Laws, (State ed.) 415. Perhaps the most instructive preamble is that which precedes St. 1791, c. 58, which was the first general statute passed on this subject after the adoption of our State Constitution. It reads as follows: 'Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labor and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor and Judge [fol. 192] of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian society: to the great disturbance of well disposed persons, and

> to the great damage of the community, by producing dissipation of manners and immoralities of life: Be it therefore enacted,' etc. Such was the idea of the Lord's day for the observance of which this system was devised."

In fact, the joint brief filed by The Lord's Day League of New England and the Archdiocesan Council of Catholic Men "lets the cat out of the bag", so to speak, in the following statement: "Each organization has various aims and purposes, but have, in common, the purpose of preventing the further secularization and commercialization of the Lord's Day."

Fortunately, in passing upon the constitutionality of the state statute, we do not have to accept the characterization of it made in *Commonwealth* v. *Has*, supra. See *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955).

It seems to us that all the objections which have been taken under the Fourteenth Amendment to the constitutionality of the statute in question are well taken.

As to the freedom of religion provisions of the First Amendment which the Supreme Court has explicitly told us have been incorporated into the due process clause of the Fourteenth Amendment and have thus become binding on the states, see *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940); *Douglas* v. *City of Jeannette*, supra, 319 U.S. 157, 162 (1943); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

We may start with the classic statement from *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither [fol. 193] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can

be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U.S. 145 (1878)] at 164."

To the above may be added the statement by the Court in the *Everson* case (330 U.S. at 18):

"State power is no more to be used so as to handicap religions than it is to favor them."

What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group. It is clear that by denying to the plaintiffs the liberty to work, shop, or pursue other "secular" conduct on Sunday, the law puts an economic penalty upon a person observing as his Sabbath some other day than Sunday by depriving him of the productive use of one further day of the week. In other words, whereas ordinary grocery stores are open six days a week, if the challenged law is constitutional the Crown Market can be open only five days, and none of these five days would include a day of the week end, when a large percentage of the week's sales is normally obtained. Even assuming that the Crown [fol. 194] Market could stay in business on such a basis, it could do so only under great handicap as against other supermarkets. Crown Market's Orthodox customers also lose much of the value of their Sunday under the same penalty, since if the law is constitutional they may not shop on either Saturday or Sunday. Without doubt if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with

shoppers whose Sabbath is observed on Sunday. The rabbi-plaintiffs would be hindered in their function of supervising the food to be eaten by the members of their congregations, and they would also suffer great detriment in their efforts to preserve, in these circumstances, due observance of the Jewish Sabbath and of the dietary laws by them.

For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment.

We think in addition that, on the decided cases, the discriminations apparent on the face of the statute constitute a denial of the equal protection of the laws, forbidden as well by the Fourteenth Amendment. See *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *City of Springfield* v. *Smith*, 322 Mo. 1129, 19 S.W. 2d 1 (1929); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P.2d 141 (1938); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N.E. 2d 52 (1938); *Ex parte Hodges*, 83 P.2d 201 (Okla. Cr. 1938); *Arrigo* v. *City of Lincoln*, 154 Neb. 537, 48 N.W. 2d 643 (1951); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952).

[fol. 195] Without elaborating the many discriminatory exceptions, two vices may be noted as examples: The statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores.[3] Employees of the favored stores

[3] (1) Bakers and their employees may sell during specified hours any food customarily sold by them, and milk as well. (2) Persons who raise fruits and vegetables and their agents may sell the same and milk also on any property they own, during all hours on Sunday. (3) Licensed innholders and licensed common victualers may sell frozen desserts, frozen dessert mix, confectionery, soda water, milk and tobacco on Sunday, and during certain hours may sell bread. (4) Persons who sell fruit, frozen desserts, frozen dessert mix, confectionery and soda water "on secular days" and are especially licensed, may sell the same and milk all day Sunday, and

are not less in need of rest than those of the Crown Market, nor does any reason appear why the operation of those stores is less calculated to disturb the rest of citizens than do the operations of the Crown Market. And many classes of work which are excepted are surely no less destructive of public rest and relaxation than the opening of the Crown Market would be.[4]

We ought to comment briefly on two Supreme Court cases much relied upon by the defendant.[5] In Hennington

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during certain hours may sell bread. (5) Druggists may sell confectionery, soda water, frozen desserts, frozen dessert mix, milk and tobacco during all hours on Sunday. (6) News dealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday. (7) Shops operated and staffed by persons who because of conscientious beliefs duly observe Saturday as the Sabbath may sell kosher meat and milk *only until 10 A.M.*

[4] For instance, the persons operating the Crown Market (or the plaintiff customers) could dig ditches, or do any other type of labor, if that were their ordinary calling, and apparently could even vend food outside the store building. Moving such business indoors can not reasonably be thought to make it more disruptive of a day of rest and recreation.

Other provisions are equally whimsical: When Rosh Hashonah or Yom Kippur begins at sundown Sunday, fish, fruit and vegetables may be sold until 12 noon; but kosher meat may only be sold until 10 A.M. One may dig for clams on Sunday, but may not dredge for oysters. All professional sports are permitted (under certain conditions) from 1:30 to 6:30 P.M., and hockey, basketball and baseball may run much longer; but amateur sports are tolerated (under the same conditions) only between 2 and 6 P.M. Bowling alleys at amusement parks may open until 12 midnight, whereas other bowling alleys must close at 11 P.M.

[5] In another case, Friedman v. New York, 341 U.S. 907 (1951), the United States Supreme Court without opinion dismissed, for lack of a substantial federal question, an appeal from a decision by the New York Court of Appeals upholding a "Sunday law" of that state upon the ground that the statute simply provided in reasonable terms for a day of rest. People v. Friedman, 302 N.Y. 75, 96 N.E. 2d 184 (1950). That case is clearly distinguishable from the one at bar; the statutes attacked are quite different. The New York law has few characteristics or roots in history tending to indicate that it is a religious regulation; and the New York courts have consistently interpreted it as a civil regulation, whereas the Massachusetts statute has most often been construed as a reli-

v. Georgia, 163 U.S. 299 (1896), the only claim considered [fol. 196] by the Court was that, under the commerce clause, a state could not prohibit the running of a railroad train in interstate commerce on Sunday. The Court held simply that congressional silence could not foreclose the field to state regulation. The opinion assumed that the statute was the purpose of securing a day of rest, as the Georgia Supreme Court had held, and reasoned from this premise (163 U.S. at 307). Also, it may be pointed out that this is a pretty old case, which was decided before the modern development of limitations upon the powers of the states implicit in the Fourteenth Amendment. In Petit. v. Minnesota, 177 U.S. 164 (1900), the Supreme Court did affirm a conviction under a Minnesota statute prohibiting all labor on Sunday "excepting the works of necessity or charity." The statute contained the provision that keeping open a barber shop on Sunday "shall not be deemed a work of necessity or charity." The Court sustained the conviction of the defendant barber on alternate grounds: (1) That "necessity or charity" did not as a matter of fact include barber shops, so that the proviso really added nothing, and (2) even if barber shops might otherwise be excused from closing, it could not be said that the classification in the circumstances was unreasonable, since courts will take judicial notice of the fact that, in view of the custom of keeping barber shops open in the evening as well as in the day, the employees in them work more, and during later hours, than those engaged in most other occupations.

This opinion shall constitute the findings of fact and conclusions of law in accordance with Rule 52(a), F.R.C.P. [fol. 197]. The form of our decree pursuant to the foregoing opinion will be settled by counsel upon due notice.

McCarthy, District Judge, dissents from the opinion and judgment of the Court, and will file a dissenting memorandum at a later date.

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gious law. Nor does the New York statute contain such prolix and irrational exceptions to its prohibitions as those which dominate the Massachusetts statute before us. Perhaps this is why counsel supporting the statute in the present case have placed such slight reliance on the *Friedman* case.

[fol. 198] [File endorsement omitted]

[fol. 199]

DISSENTING OPINION—June 4, 1959

McCarthy, D. J. (Dissenting). The plaintiffs here, a corporation and some individuals who are officers, stockholders or allegedly customers of the corporate plaintiff, and an Orthodox Jewish rabbi, sought by complaint to have a statutory three-judge court convene to determine the constitutionality of Section 5 of Chapter 136 of the General Laws of the Commonwealth of Massachusetts. The defendant is the Chief of Police of the City of Springfield wherein the corporate plaintiff has its place of business. The court permitted one joint amicus curiae brief to be filed by intervening parties for each side of the question.

The plaintiffs filed a motion for a preliminary injunction which was never acted upon by the court. The defendant filed a motion to dismiss. As the record in this case will show, the hearing was devoted largely to arguments in the motion to dismiss. Some evidence was taken on the merits and various stipulations were filed with the court.

I am in complete disagreement with my colleagues on the court as to what constitute the facts in this case. The corporate plaintiff is managed by one Chernock, who is a director and the owner of 50% of its stock. In 1957 the Supreme Judicial Court of Massachusetts affirmed a judgment of conviction against Chernock on three complaints charging him with a violation of the precise section of the General Laws of Massachusetts, the constitutionality of which has been challenged in this proceeding. *Commonwealth* v. *Chernock*, 336 Mass. 384. In the state proceedings the cases were submitted to the Supreme Court on an Agreed Statement of Facts which differs radically from what has been accepted by this Court as the basic facts in issue.

[fol. 200] Paragraph 5 of the complaint alleges that the corporate plaintiff is . . . "selling food to Orthodox and Conservative Jewish persons, prepared in accordance with the tenets of their religion." Paragraph 11 of the complaint alleges that "Crown Market is a completely Kosher Supermarket". The foregoing allegations and other language in

the complaint would lead one to believe that the corporate plaintiff is engaged exclusively in the sale of Kosher meats and foodstuffs having a religious significance. In support of the allegations of the complaint, Chernock testified that he was the owner of 50% of the stock of the corporation and that approximately 95% of its sales were of Kosher foods. Chernock further testified that some foodstuffs were sold to non-Jewish customers on Sundays.

On the other hand in the case of *Commonwealth* v. *Chernock* (supra), the Massachusetts Supreme Judicial Court in its opinion stated as follows at page 385: "The cases were submitted on the following agreed facts. The defendant conducts a combination *Kosher* and *Super Market* which, because of its religious convictions is closed to business every Saturday and Jewish holiday, but remains open to business on Sundays. On the days specified in the complaint, which were Sundays, the plaintiff kept his market open after 10:00 o'clock in the forenoon and until closing time and did sell *to the public* Kosher meats, *bakery goods, vegetables* and *canned goods of all types.*" (emphasis added)

It is most disturbing to observe the discrepancies between the allegations of the complaint in this case and the agreed upon facts in the state court case. Quite obviously both cases are concerned with the same market and the same individual in the person of Chernock.[1] The inference from

[1]The defendant's bill of exceptions in the state court cases establishes the identity of the defendant in that case with the plaintiff in the instant case. For example, the defendant therein filed a motion to dismiss which was captioned "Commonwealth v. Harold Chernock D/B/A Crown Market". The defendant's brief in that case under the heading "Issue No. 2" raised the same issues that are raised here, namely, freedom of religion and equal protection of the law under the Massachusetts Constitution and Declaration of Rights. The same defenses under the First and Fourteenth Amendments were available to the defendant in the state court case. After conviction in the Superior Court of Massachusetts (the trial court), a bill of complaint was brought in that court by the defendant for the purpose of restraining the authorities from enforcing the law pending the outcome of an appeal to the Supreme Judicial Court. It is noteworthy that the petitioner in that complaint is "Crown Kosher Super Market of Mass., Inc. alias Harold Chernock D/B/A Crown Market". Copies of these documents are being filed in the Clerk's office of the U. S. District Court at Boston.

[fol. 201] the language of the complaint is that the corporate plaintiff is engaged exclusively in the business of selling Kosher meat and Kosher food products—as witness the words "a completely Kosher market". On the other hand, the agreed statement of facts in the state court case make it clear that the market sells to the public all kinds of vegetables, groceries and bakery goods in addition to Kosher meats and Kosher foods—as witness the words "a combination Kosher and Supermarket". There are no limitations in the corporate plaintiff's charter, a certified copy of which I am annexing to this opinion, as to the character of foods it may sell. It would appear to me that in a case of this magnitude involving as it does the striking down of a state statute, there should be no doubt or confusion as to the facts. The court should know whether this market is a store for the sale of religious foods, if one may use that expression, or whether it is a super market selling all kinds of food to the general public. If it be the latter, as is indicated by the agreed statement in the state court case, then the fears expressed in the majority opinion that the religious rights of some persons are not being safeguarded may be laid at rest. In that event we need look no further to find the reason for the great volume of sales on Sundays, which would appear to be the very obvious reason that the corporate plaintiff's competitors are closed on Sundays observing the general day of rest prescribed by the laws of Massachusetts. It is therefore my opinion that if the decision in this case is to turn in any degree on [fol. 202] the factual situation, the interests of justice would best be served by reopening the case in this court for the purpose of taking testimony to establish the truth.

On the assumption that the alleged facts accepted by the court as to the nature and extent of the corporate plaintiff's business are of no significance, and on the further assumption that the sole issue before the court is whether or not the Commonwealth of Massachusetts may constitutionally enact a statute providing for the general closing of shops, warehouses and workhouses on Sunday, then I would allow the motion to dismiss on the basis that this Court will not and should not exercise its equitable powers to prevent enforcement of a state criminal statute where

an adequate means to test the validity of the statute in the state court exists. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89. The complaint before the Court does not allege that irreparable harm will be suffered by the plaintiffs if this Court should refer the plaintiffs to their remedies in the state court and before the Supreme Court of the United States by way of certiorari.

The majority would exercise equitable power on the basis of the holding in *Ewers* v. *Dwyer*, 358 U.S. 202, to the effect that a three-judge district court may not decline to take jurisdiction of a suit to enjoin operation of a state criminal statute where the enforcement of the statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute. Assuming, only for the moment, that enforcement of the state statute in question could deprive one of the alleged plaintiffs of a civil right it is apparent from the stipulation of fact filed by the parties and from the majority opinion itself that the state court stands ready [fol. 203] to enjoin enforcement of the statute pending adjudication and that the defendant stands ready to refrain from enforcing the statute pending adjudication.

The majority opinion further admits that this concerns only the corporate plaintiff for the individual plaintiffs, under existing Massachusetts law, cannot be charged with violation of this statute. The majority make a very tenuous argument that the only way that the individual plaintiffs may "vindicate the constitutional rights claimed is by obtaining equitable relief." The so-called constitutional right claimed by the individual plaintiffs is the asserted right to purchase food at any hour and this asserted right allegedly flows from the constitutional rights to liberty and to the free exercise of religion. In essence the sole complaint of the individual plaintiffs is that it is inconvenient to be unable to shop at all hours on Sunday. This was frankly admitted by counsel for the plaintiffs in argument. (Transcript p. 50, p. 61,) I believe that the individual plaintiffs are before the Court as "window dressing" to enable the corporate plaintiff to rely upon arguments that freedom of religion has been infringed and thereby help the corporate plaintiff to gain a commercial competitive advantage. For these reasons I would hold that none of the

alleged plaintiffs has presented an infringement of a substantial right and that the requirements of *Evers* v. *Dwyer*, supra, have not been met. I would relegate the plaintiff corporation and alleged plaintiffs to the state courts for their remedies.

Since the majority opinion goes to the merits of the case I feel that I would be remiss in my duties if I did not state my views upon the merits.

There are two basic issues here presented:

1. Is the statute in question religious in nature?

[fol. 204] 2. If not religious in nature does the statute violate the equal protection clause of the Fourteenth Amendment?

McCollum and *Everson* make it clear that a statute which aids a religion or all religions or no religion or favors one religion over another is unconstitutional as a violation of the Fourteenth Amendment. Those cases both turn upon the question of the expenditure of public funds in aid of religion. On this point they are distinguishable. The cases do not declare unconstitutional a legislative enactment which recognizes the existence of a Supreme Being. The "high wall of separation" imported into those cases is fiscal in nature.[2]

Many examples of constitutional enactments recognizing the existence of a Supreme Being or of organized religion could be cited. A few are: the appointment of chaplains for the Armed Forces and for houses of legislature; the words "In God We Trust" upon currency; the inclusion of "under God" in the pledge of allegiance; draft exemptions for clergymen and conscientious objectors; tax exemptions for religious organizations.

The statute before the Court is not religious in nature in the sense of *McCollum* and *Everson*. It provides for no expenditure of public funds in furtherance of any or all religions.[3] It compels no religious observation nor does it interfere with any person's religious practices. In the absence of a definitive statement by the state court as to

[2] See complete discussion of the source of this phrase in *Reynolds* v. *United States*, 98 U.S. 145, 162-164.

[3] See *Doremus* v. *Board*, 342 U.S. 429.

the meaning or federal constitutionality of the state statute, this Court would be bound to pass upon these questions if [fol. 205] properly presented. *Doud* v. *Hodge*, 350 U.S. 485. The converse is also true. It is for the highest court of the state to tell us the meaning and application of a state statute. *Minnesota* v. *Probate Court*, 309 U.S. 270, 273; *United States* v. *Burnison*, 339 U.S. 87, 89; *In re Murchison*, 349 U.S. 133, 135. This Court must give weight to the expression of the state court. In the instant case there have been many expressions of the meaning of the state statute by the Supreme Judicial Court. These expressions have also made clear the federal constitutionality of the state statute.

It is clear that the statute before the court had some religious intent in its initial form. The preambles to the early enactments make this fact obvious. In the majority opinion much is made of this circumstance. For my part the fact that a statute has religious roots is not disturbing at all. Many of our laws have religious roots which lie deep in the religious background and traditions of the American people.[1] Frankly, I can think of no better roots that a law might have. The statute, however, providing as it does for a day of rest and cessation from business activities is clearly within the police power of the state and no apologies need be made for its history and origin.

The Supreme Judicial Court of Massachusetts had occasion to pass upon the question now before this Court in 1876, long before the inclusion of the First Amendment in the Fourteenth and long before the development of the line of cases exemplified by *McCollum* and *Everson*. In [fol. 206] these circumstances it cannot be said that the Supreme Judicial Court was writing its way around constitutional prohibitions or that the police power theory is recent contrivance.

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[1] By Executive Order and Presidential Proclamation, Christmas is designated each year as a holiday. This day, commemorating as it does the birth of Christ, is celebrated as a day of rest and cessation from business. No day could have deeper or more significant religious roots, yet if the reasoning of the majority is carried to its logical conclusion, such Presidential Proclamation contravenes the Constitution in its application to all persons, including non-Christian inhabitants of the United States.

The legislative intent in this statute was stated in *Commonwealth* v. *Has*, 122 Mass. 40, 42, as follows: "This act has been so frequently recognized in both civil and criminal cases, and its various provisions have been so often the subject of judicial decision, that its constitutionality can hardly be considered an open question. It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusement of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community."

[fol. 207] In *Commonwealth* v. *White*, 190 Mass. 584, the Supreme Judicial Court referred to the preambles to the early enactments of the statute which are sound in the day of rest purpose and in the religious observation purpose. This case does not hold that the statute is religious in purpose and intent. There the Court was concerned with what is "work of necessity" and determined that commercial cranberry picking was not a work of necessity within the meaning of the statute. The issue of religious freedom was not before the Court.

The language quoted above from *Commonwealth* v. *Has* has been recently affirmed in *Commonwealth* v. *Chernock*, 336 Mass. 384.

A thorough study of the Constitution of the Commonwealth of Massachusetts and the construction placed upon it by its highest court furnishes convincing proof that this state is second to none in the safeguarding and preservation of the rights and privileges of all of its inhabitants. The Constitution of Massachusetts in Part I, Article II, guarantees to all the freedom of religion. Part I, Article III, provides among other things that "all religious sects and denominations . . . shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law." (Inserted in 1833 by the Eleventh Article of Amendment.)

Article XVIII of the Articles of Amendment, after reasserting the freedom of religion, prohibits the use of any public funds for "any church, religious denomination or society." (Inserted in 1917 by the Forty-Sixth Article of Amendment.)

These provisions of the Constitution of Massachusetts [fol. 208] and many decisions of the Supreme Judicial Court indicate the scrupulous concern that the Commonwealth has for the rights, privileges and immunities of its inhabitants. In Volume 6 of the Opinions of the Attorney General, (1922) at page 483, is to be found the statement that the Constitution of Massachusetts "guarantees life, liberty and property, and equal protection to the same extent as does the Fourteenth Amendment."

It should not be inferred, however, that the Constitution of Massachusetts reflects any indifference towards religion and religious values. In its Preamble there is an acknowledgment by its framers of the "goodness of the great Legislator of the Universe", and a prayer for "His direction" in the establishment of the Constitution. Part I, Article II, declares that "it is the right as well as the duty of all men in society publicly and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the Universe." Part I, Article III, contains the following language " . . . the public worship of God and instructions in piety, religion and morality promote the happiness and prosperity of a people and the security of a republican government." In *Opinion of the Justices*, 214 Mass. 599, the Supreme Judicial Court said at page 601: "The Con-

stitution of Massachusetts in several clauses inculcates the practice of religion and urges the public worship of God as essential means for the perpetuation of republican institutions. But in emphatic and unmistakable terms it guarantees to all our people absolute freedom as to religious belief and liberty, unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated." That these guarantees exist for all, whether Chris- [fol. 209] tian or non-Christian, is settled beyond doubt by the decision of *Glaser* v. *Congregation Kehillath Israel*, 263 Mass. 435. In that case, at page 437, it was said: "These great guarantees of religious liberty and equality before the law of all religions are not confined to adherents of the Christian religion or to societies and corporations organized for the promotion of Christianity. They extend likewise to the adherents of the ancient religion whose sacred scriptures form a part of the Bible. We are of the opinion that Jews as well as Christians are protected by these explicit declarations of religious equality."

I have deemed it necessary to cite these provisions of the fundamental laws of Massachusetts and these few excerpts from the opinion of its highest court in view of the reference by the majority of this court to the decision of the *Commonwealth* v. *Has* as being an "ad hoc improvisation" and to other similar references to the interpretation placed by the Supreme Judicial Court upon the laws of the Commonwealth. The majority of this court has seen fit to label the Supreme Court's construction of the statute in the Has case as a "characterization" rather than as a construction of the law of Massachusetts.

I see nothing in the Constitution of Massachusetts, the decisions of its highest court, or the law now under attack, that warrants this court to challenge either the spirit of the law or the motives of that court. I perceive no occasion here to go behind the construction of the law of a sovereign state, placed upon it by its own highest court, which would appear to me to be in a better position to interpret its own law than this court. If there be occasions for a federal

court to question the motives of the highest court of a [fol. 210] state in construing its own statutory law, this is not one of them.

The Supreme Court of the United States has had two occasions to pass upon and to uphold statutes against claims that they violated the establishment of religion clause of the First Amendment or the clause banning any statute which prohibited the free exercise of religion contained in the same amendment. These cases are illustrative of many similar decisions by the Supreme Court of the United States. I select them because of the applicability of their language and because I think that they should be contrasted with the authority of the majority.

In *Reynolds* v. *United States*, 98 U.S. 145, the Court was faced with a defense to the charge of polygamy based upon the religious beliefs of the defendant. At pages 162-167 the Court said: " . . . (T)he question is raised whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

"The word 'religion' is not defined in the Constitution. . . . [fol. 211] The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

. . .

" . . . Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

. . .

". . . Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

. . . .

"So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

In *Zorah* v. *Clauson*, 343 U.S. 306, the Court was faced with a refinement of the "released time" program of McCollum in the sense that there was no expenditure of public funds to house the religious training classes or to oversee the children en route to the classes. In a six to three split the Court upheld the statute over objections that the statute violated the first and second clauses of the First Amendment. It was held that the state may cooperate with and recognize the existence of organized religion. At page 313 [fol. 212] it was said: "We are a religious people whose institutions presuppose a Supreme Being."

In differing conditions the Supreme Court of the United States has passed upon statutes requiring the cessation of either all or some business on Sunday. In 1885, in *Soon Hing* v. *Crowley*, 113 U.S. 703, the Court said, at page 710, "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observance, but from the right to protect all persons from the physical and moral debasement which comes from uninterrupted labors. Such laws have always been deemed beneficial and merciful laws especially to the poor and dependent, to the laborers in their factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States." In *Hennington* v. *Georgia*, 163 U.S. 299, in 1896, the Supreme Court set out the rule and the answer at pages 303-304, "The well settled rule is that if a statute purporting to have been enacted to protect the public health,

the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. . . . It (the statute) is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the [fol. 213] wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor."

The 1950 case of *People* v. *Friedman*, 302 N.Y. 75, upheld a similar statute against the same objections of interference with religious freedom. The Court of Appeals for the State of New York recognized that the Sunday laws were religious in origin but were maintained by the legislature for public health and safety purposes. On appeal to the Supreme Court of the United States a motion to dismiss was granted on the basis that no substantial federal question was presented. *Friedman et al.* v. *New York*, 341 U.S. 907.

With regard to the comment in the foot note on *Friedman* v. *United States*, 341 U.S. 907, *People* v. *Friedman*, 302 N.Y. 77-78, the following is pertinent:

The foot note asserts that the "New York statute has few characteristics or roots in history tending to indicate that it is a religious regulation". The fact is that *People* v. *Friedman*, at 96 N.E. 2d 186, asserts "that the so-called Sunday laws may be said to have a religious origin". The case goes on to say that even if the Sunday law to-day (i.e. in 1950) is penal in nature, Sunday is now set aside as a day of rest as wise and necessary to set apart for both the physical and moral welfare of a state or community.

With reference to this foot note, attention should be drawn to the preliminary report of the joint legislative

committee on Sabbath Law, State of New York, Legislative Document (1952), No. 50, published by Williams Press, Inc., Albany, New York, in 1952. This legislative document (at page 11) gives the chronology of New York laws both colonial and state. The first Sunday law from a New York [fol. 214] colony was enacted in 1664 and was known as the "Duke of York's Laws". In 1685, the General Assembly passed the first New York Colonial statute on the subject—a bill against Sabbath breaking. Generally this Colonial statute forbade wordly labor, business, or work of ordinary callings, prohibited traveling and sports and any exercises except works of necessity or charity. In 1695 the Colonial Assembly enacted another act against profanation of the Lord's Day, prohibiting traveling, servile labor, and working, etc.

In 1778 an act for suppressing immorality was first passed in New York as a state. This act repeated almost verbatim the prohibitions of the 1695 law. During the next hundred years there are only a few minor changes.

Finally, in 1881 the Penal Code was adopted and the prohibitions against work, labor, business, and sports were arranged in separate sections. Aside from the section on public traffic on Sunday, and the section on public sports on Sunday, there were very few amendments to the Sabbath article from 1881 to 1952, a period of approximately seventy years.

Section 2140 of the New York Penal Code, entitled "The Sabbath", sounds the key note of the Sabbath article in the following language: "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community".

How then, can the foot note state that the New York statute has few characteristics or roots in history tending to indicate that it is a religious regulation, when the legislature of the State of New York specifically designated it as regulating a religious day for a period of over approxi- [fol. 215] mately 170 years, and when the statute had colonial roots extending back for a further period of 114 years?

As to the statement that the Massachusetts statute is dominated by "prolix and irrational exceptions", with the intimation that the New York statute was not so characterized, it might be pertinent to point out that the Legislative Document No. 50 (1950) above referred to has as its "Preamble" the following statement from the annual message to the Legislature by Governor Thomas E. Dewey under date of January 9, 1952:

> "The Penal Law provisions on Sabbath observations date back many years. The original broad provisions have been whittled away through the years by numerous exceptions and the present provisions create an illogical and inconsistent pattern. Although it is legal to conduct professional baseball, football, and soccer games on Sunday in many communities, it is illegal to conduct other sporting events and activities similar to those which are permitted. There are many other incongruities and examples of disparate treatment. Many activities which do not interfere with the religious repose of the community are prohibited by existing law. There is need for a careful re-examination of these provisions. I recommend that your honorable bodies establish a joint legislative committee to study the problems".

It is significant that the Governor of the State of New York clearly recognized that Sabbath Day regulations was a matter for the Legislature, and he merely indicated that the law could be modernized to permit "activities which do not interfere with the religious repose of the community." To the intimation of the foot note on the Friedman case that the New York statute has few roots in history tending to indicate that it is a religious regulation, the true characteristics and roots of the statute may be found in expressions indicating a religious connotation from colonial laws in 1664 to the recommendation of the Governor of the State in 1952.

This brings us to the second issue, that of equal protection. With the religious issue disposed of, the possibility of violation of equal protection arises from the exceptions

to the statute. So long as the exceptions are not unreason-
[fol. 216] able on their face we have no power to pass upon them. *Smith* v. *Cahoon*, 283 U.S. 553, 566-567, "The principle that the State has broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court (citing cases). But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action."

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79.

The Supreme Judicial Court of Massachusetts has adopted similar standards for determining the constitutionality of a legislative enactment and has used language
[fol. 217] particularly applicable here.

"The plaintiff contends that the statute imposes an arbitrary and unreasonable restriction upon its right to conduct its business, and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and of Articles 1 and 10 of the Declaration of Rights of the Constitution of

Massachusetts and by the Fourteenth Amendment to the Constitution of the United States. And the right to engage in such a business or occupation carries with it the making of contracts, the advertising of goods, the solicitation of customers, and the adoption of the various means that are usually employed to encourage trade and to extend the market for goods. *Holcombe* v. *Creamer*, 231 Mass. 99, 108, 109. *Opinion of the Justices*, 271 Mass. 598, 601. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 113. *New States Ice Co.* v. *Liebmann*, 285 U.S. 262, 278. But one cannot conduct his business or pursue his occupation in any way he may desire. He is subject to reasonable regulations designed to protect the public interest. A reasonable regulation governing the sales of property does not deprive the owner of his property without due process of law. *Commonwealth* v. *Crane*, 162 Mass. 506. *Commonwealth* v. *Libbey*, 216 Mass. 356. *Nebbia* v. *New York*, 291 U.S. 502. *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176.

. . .

". . . The legislature possesses a large measure of discretion to determine what the public interest require and what means should be taken to protect those interests. The field for the legitimate exercise of the police power is coextensive with the changing needs of society. The record does not negative the existence of any of the possible findings [fol. 218] that have been mentioned. All rational presumptions are in favor of the validity of an act of the legislative department of the government. *Perkins* v. *Westwood*, 226 Mass. 268. *Moore* v. *Election Commissioners of Cambridge*, 309 Mass. 303. *Morrissey* v. *State Ballot Law Commission*, 312 Mass. 121, 130.

. . .

"One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported. 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.' *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251,

257-258. 'The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth.' *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185.

. . . .

"The contention of the plaintiff that the statute imposes an arbitrary and unreasonable restriction upon its business cannot be sustained." *Merit Oil Co.* v. *Director, Necessaries of Life*, 319 Mass. 301, 302-306.

Testing the statute before the Court by each of the tests set out I believe that the answer must be in favor of the validity of the statute. Essentially the test is whether or not the exceptions are reasonable or are so arbitrary that this Court would be warranted in invading the province of the General Court of Massachusetts. Each of these exceptions was engrafted upon the statute at a different time and each was engrafted by vote of the legislature of Massa- [fol. 219] chusetts. Careful analysis of the exceptions warrants the conclusion that each exception either allows the operation of a business which the General Court has determined is necessary or serves as an aid to the achievement of the rest and relaxation for which the legislature has set aside the day.

The late Chief Justice of the Supreme Court of the State of New Jersey, in an opinion upholding the state statute which banned the sale of automobiles on Sunday, said, "The State has an absolute right to enter here and force on all and everyone so engaged regulations for the benefit of the public, and it is not for the Court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to the public or social evils requiring similar legislation that are yet unregulated . . . " *Gundaker Central Motors* v. *Gassert*, 23 N.J. 71, 127 A. 2d 566. An appeal to the Supreme Court of the United States was dismissed for failure to present a substantial federal question. 354 U.S. 933.

I would ordinarily say nothing further but I believe that the opinion of the majority demands some comment by me. The factual statements of the majority opinion contain

some unwarranted assumptions. They state that business considerations make operation of the corporate plaintiff's store on Saturday night impracticable. If the store closed at 10 p.m. on Saturday night an average of four hours business could be conducted for most months of the year. It should be borne in mind that it is alleged that the customers of the corporate plaintiff's store are not casual passers-by nor persons who treat it as a convenient corner grocery. It is the basis of the complaint that the customers inconvenience themselves to shop at the store. The cor- [fol. 220] porate plaintiff would pay no more to have its employees work on Saturday night and Sunday morning than it already pays them to work all day Sunday. I do not agree that Saturday night and Sunday morning operation within the statute would be impracticable.

The majority of the Court also state that it is common knowledge that a grocery store's business is concentrated on Friday evening and Saturday. This contradicts the equally common knowledge that super-marketeering has changed the buying habits of the consumer and has tended to level out the volume of business of grocery stores. Based on a mis-assumption as to the buying habits of the consuming public the majority of the Court attribute the Sunday volume of the corporate plaintiff's store to the buying habits of Orthodox and Conservative Jews. This volume might as well be attributed to the fact that the corporate plaintiff's store is the only super market open on Sunday in the area. (Transcript p. 120). Further, the manager of the corporate plaintiff's store testified at hearing that Sunday business is not exclusively with Orthodox and Conservative Jews and that the store does not refuse to sell on Sunday to Gentiles. He said, "We don't discriminate. It would be bad business not to (sell to whoever came into the store)". It should also be added that examination of the day book of the corporate plaintiff, which was introduced in evidence, indicates that the corporate plaintiff's store, on Labor Day, did a volume of business which was greatly disproportionate to the business done on Mondays which were not holidays. This on a day after a Sunday on which they did their usual heavy business. The conclusion which I draw from this fact is that the

store's Orthodox and Conservative customers either bought almost twice as much in this week as in other weeks or that the store was taking advantage of the fact that it was the only super market open on the holiday. The latter appeals [fol. 221] more to reason than the former.[5]

It is stated in the majority opinion that "if the challenged law is constitutional the Crown Market can be open only five days". This statement is correct when the distinction is added that the corporate plaintiff may not lawfully do business on Sunday, except during the hours established by the legislature, according to the secular law of the state, and that the corporate plaintiff may not do business lawfully between sundown on Friday and sundown on Saturday according to the law of Orthodox Judaism, which law is not part of the jurisprudence controlling this Court. The point I wish to make is that under the law with which we must concern ourselves, if the statute is constitutional, the corporate plaintiff is lawfully prohibited from doing business on only one day of the week.

If the bald statement quoted above is correct what is to prevent an unscrupulous business man from forming or joining a religious body which observes as its Sabbath the day of the week on which his business is slowest? If, in the view of the majority, he closes his place of business on his Sabbath, then he has the constitutionally protected right to open his business, whatever it may be and wherever it may be located, on Sunday and do business with any and all customers. I do not think that this argument need be further expanded in order to demonstrate the logical fallacy inherent in the position taken by the majority.

The majority accuse the Supreme Judicial Court of Massachusetts of intellectual dishonestly in writing the *Has* case when they say that the decision was an "ad hoc im-[fol. 222] provisation", yet the majority blissfully ignore the very real distinction between the *Has* case and *Common-*

[5] The corporate plaintiff offered in evidence a record of its sales (Ex. 1). It is interesting to note that on Sunday, June 30, 1957, its gross sales were $3,583.61; on Wednesday, July 3, of the same year—$2,883.30, and on the following day, July 4, 1957,—$5,492.68. The religious convictions of some of the plaintiff's customers cannot explain this statistical data.

wealth v. *White*, supra. However, the majority choose to describe the language of the *Has* case quoted above as "characterization" rather than as "construction" so that they could bring it under the rule of *Society for Savings* v. *Bowers*, 349 U.S. 143, 151, rather than the line of cases represented by *Minnesota* v. *Probate Court*, supra, *United States* v. *Burnison*, supra, and *In re Murchison*, supra, all of which hold that a construction as to the meaning of a state statute by the highest court of a state is binding upon the Federal Court.

The majority of the court in its opinion is highly critical of the exceptions in Section 6 of Chapter 136 of the General Laws of Massachusetts, to the blanket prohibition of Section 5 and refers to some of them either facetiously or as being the likely result of action by "pressure groups". I find nothing either in the record or in the law that warrants any such conclusions to be drawn. If there be anything in the legislative history of these exceptions which were enacted into law at various sessions of the Legislature and over a period of years that warrants such conclusions, it is unknown to me.[6] The granting of these exceptions by the

[6] In the majority opinion it is stated that "the statute does not generically forbid the keeping open of a store on Sunday to sell food, but it just limits this liberty to selected types of stores. Employees of the favored stores are not less in need of rest than those of the Crown Market" etc. In a footnote relating to the subject matter the court has listed many of the exceptions which it characterizes as "whimsical", "prolix" and "irrational". In my judgment there is no warrant or justification for the phrase "favored stores" or for the harsh adjectives employed. What the Legislature has done is to give recognition to the nature of the day as a day of rest, leisure and relaxation by permitting the sale of some foods and beverages which are believed to be necessary or to contribute to the refreshment of that day. No markets are permitted to be open at any hours on Sunday except markets for the sale of Kosher meat and milk which may remain open until 10:00 A.M. All other markets are closed including the super markets and large general stores. The classification established by the Legislature quite obviously refers solely to the types of stores and the products they sell, and in no way to the race or religion of the proprietor or the employees.

In the absence of a legislative history of each enactment creating the various exceptions that appear in Section 6 of Chapter 136 of the General Laws, the mere listing of the exceptions is wholly

Legislature appear to me to be matters of public policy peculiarly within the competence of the Massachusetts Legislature and well beyond the competence of this court. If I were to draw any conclusions from a study of these exceptions, I would say that they were undoubtedly granted for the purpose of accommodating the law to the needs of a developing society and that they were made for the purpose of contributing towards the refreshment of the people's participation in their day of rest. Some, perhaps, have been determined to be works of necessity under the present conditions of society. However, that may be, they are legislative matters and matters of public policy affecting the people of Massachusetts and are not in any sense

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without meaning. Those relating to sports will be found to be much the same as the laws of other states regulating the conduct of amateur and professional sports on Sundays. The provisions of the law which permits the digging of clams on Sunday but not the dredging for oysters is characterized in a footnote to the majority opinion as being "whimsical". The fact is—and this is certainly common knowledge to the people of Massachusetts—that for generations, people residing along the seashore of the state have been digging clams for sport and for their own consumption when the tide is at a low ebb; whereas the dredging for oysters is a commercial enterprise involving the cultivation of oyster-beds, skillful dredging and other specialized activity. The distinction is not at all whimsical although it might appear to be so to the casual critic.

Further, the same footnote in the majority opinion states "Newsdealers whose stores are open every other day of the week (thus excluding Sabbath-observing Jews) may sell milk and tobacco at all times on Sunday". No such unreasonable interpretation has ever been placed on this section of the statute by any court. The statute obviously refers to regular newsdealers whose places of business are permitted by law to be open throughout the week and it certainly does not mean that if an individual newsdealer sees fit to close his doors on any particular day, he is thereby prohibited from opening on Sundays. Such an interpretation is lacking in logic and plain common sense. To suggest that Jewish newsdealers are prohibited from making the same sa[illegible] on Sunday as their Christian competitors is not a correct statement.

The other exceptions in the statute could be similarly reconciled, but the foregoing will suffice to illustrate that the people of Massachusetts and their legislators have not busied themselves throughout the years with enacting laws that are whimsical, prolix or irrational. Least of all are the exceptions discriminatory.

matters for this court to discuss and debate. In my view, [fol. 224] it constitutes an unwarranted intrusion for a Federal Court to substitute its judgment on such matters for the judgment of the members of the Legislature who are elected by, and are directly responsible to the people of the Commonwealth of Massachusetts.

The history of the Lord's Day statute, which has been referred to as one of the "blue laws" of this Commonwealth by my colleagues, is one which dates back to the union of the states and is a part of the Golden Treasury of the kind of a civilization which every good citizen must try to perpetuate. It is not only a day of rest, but, quoting from the decision of *Commonwealth* v. *McCarthy*, 244 Mass. 484 at page 486:

> "... that the day could not be merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and response undisturbed by secular cares or amusements. Whatever inconvenience might result at the present day from the literal and general enforcement of the Lord's Day Act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute."

The courts of the United States, the courts of the States, and those who help to frame our laws and who help to chart our way of life must make certain that the line is held within the law against any person who would make the law nothing more than an instrument for destroying religion in the name of democracy. I believe that this should be the credo of all people regardless of their religious beliefs.

It must never be forgotten that ours is a government of laws predicated upon majority rule, and it must be remembered that when this day was set the States of the Union had each reserved to itself the right to enact statutes within the boundary lines of its constitution for the comfort, safety, and convenience of its people and the spirit of rest, comfort, and quietness of a Sunday in the lives of the [fol. 225] people of Massachusetts, with the importance of

having in mind other economic factors, and with the recognition of the value of the obligations and responsibilities of parents and the happy relationship of members of families associated with this day which not only has the aspects of rest, recreation and association, but also spiritual reflection. We cannot become prisoners of a false philosophy, which is truly dialectical materialism, and which in plain language represents the philosophy of Marx, Engel and Lenin, neither can we deny the right of others to disagree with our point of view. But is the person promoting this suit actuated by the spirit of the early founders of this great country, is he safeguarding the rights and privileges of our American society or is he using this as a medium by which to destroy these spiritual and economic values, the inevitable result of which might well be the complete destruction of our way of life? And if this were to happen, of what value would be our Constitution and laws, and our democratic way of life?

It is difficult to escape the conclusion that this is an example of an attempt to strike down the Constitution of Massachusetts and the Lord's Day as violative of rights under the First and Fourteenth Amendments of the United States Constitution on the basis of alleged religious belief, so that articles of every nature and description, kosher or non-kosher, could be sold. Examination of some of the documents attached to the appendix, which represent a part of the opinion filed in the Clerk's Office, clearly shows this.

Examination of the docket discloses that the appearance of the late Attorney General of the Commonwealth of Massachusetts was filed on July 23, 1958. While three amendments to the complaint which were filed during the summer of 1958 were assented to by attorneys for the Chief of Police of Springfield, they did not contain the name of the Attorney General although counsel for the plaintiff well knew notice had been given to the Attorney General under the statute. After the successor to the Attorney General had qualified the case was marked for hearing on October 30, several days before that the successor to the Attorney General requested a delay so that he might prepare and participate. At the hearing on November 3 the brief of the Commonwealth and a stipulation of fact were filed. The stipulation of fact does not agree with the evidence presented. No evidence was offered by the Attorney General's representative, who was the only active counsel for the side adverse to the petitioner.

[fol. 226] I am directing the Clerk of the Court to file as an appendix to the original copy of the opinion, which will be a matter of public record, copies of the following documents: Certified copies of Complaints against Harold Chernock doing business under the name and style of the "Crown Kosher Market, Inc.", the Defendant's Bill of Exceptions in the same case, which was filed on September 6, 1956, together with a brief filed by the Commonwealth of Massachusetts with the signature of the then District Attorney of the County of Hampden Stephen A. Moynahan; the brief of the defendant Chernock so called, doing business under the name and style of the "Crown Kosher Market, Inc.", and an exemplified copy of a Bill in Equity with the request for a temporary restraining order filed in the Superior Court of the County of Hampden, with the caption for the plaintiff "Crown Kosher Super Market of Mass., Inc., alias Harold Chernock d/b/a Crown Market", with the attorney for the petitioner in part the same as the one entered for the petitioner in the three judge court case; and a copy of the Certificate of Incorporation of the Crown Kosher Super Market of Massachusetts attested to by the Secretary of the Commonwealth. It may be said parenthetically also that while there was an interlocutory decree for a temporary restraining order granted, this was obtained through no hearing but upon consent of counsel of record in this particular case.

The so-called cash book offered by the complainant's counsel, available for examination and marked as an exhibit, is a very small ledger book which contains figures running only from June, 1957, down to November, 1958. I am co-relating this with the footnote #5 on page 24, which discloses the fact that this store was open on every day in the year (with the exception of Saturdays, and other Jewish Holidays and Thanksgiving Day), including [fol. 227] Labor Day of 1957 and 1958, and that on all these days where business had been suspended by others, very substantial amounts running into four figures were taken in.[8]

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[8] July 4, 1957 $5,492.68; September 1, Sunday, $4.179.58; September 2, Labor Day, $2,536.45; Christmas Day, $1,885.86; January 1, 1958, Wednesday, $2,233.66; July 4, 1958, $5,816.98; August 31, Sunday, $3,670.05; Monday, Labor Day, $2,173.52.

These facts speak for themselves, but a fair inference from all these entries discloses the fact that the business of this Crown Kosher Meat, Inc., alias Chernock, amounted to at least $600,000, and that about 40% of this business occurred on Sunday and on Mondays, particularly when a holiday was celebrated. They show figures of a very substantial nature on the 4th of July of 1957 and 1958. This is evidence of the commercial point of view in contradistinction to the spiritual and patriotic background of a day dedicated to the courage and Americanism of our Founding Fathers, when there was truly a great heritage passed down to the people of the United States by a proclamation on that same day that a new nation was born in keeping with the written Declaration of Independence, and the Crown Kosher Meat Market so-called remained open.

In closing I feel constrained to say that the law sought to be invalidated here has been on the statute books of the Commonwealth of Massachusetts in substantially its present form since Massachusetts joined the Union. Until very recently there was scarcely a voice raised against what has become a traditional part of our way of life. Those who framed the Constitution of Massachusetts, and indeed those who framed the Constitution of the United States, saw nothing incompatible in the observation of the Lord's Day as a day of rest, and there is nothing in the Constitution of either the United States or Massachusetts that admits of any such strained interpretation as is sought here to [fol. 228] the First and Fourteenth Amendments. The opinion of the majority of the court, if allowed to stand, will advance the cause of religious freedom and liberty not one iota. Its inevitable effect will be to disunite and divide the people of this Commonwealth, to dislocate our economic set-up, and to lay the foundation for the growth and development of cancer "isms", having in mind the economic values that are co-related with other statutes of the Commonwealth regulating hours of work and hours of labor and the rights and privileges of owners of many places of business engaged in many specialties, who do not seek to carry on their business activities on the Lord's Day. The law should be upheld.

I feel that I have discussed this matter sufficiently in the opinion, but I am disposed to re-emphasize the fact that ours is a government by the majority and that this majority should not be unreasonably unfair with the rights of the minorities who sincerely observe their religious beliefs. The good Jewish people, particularly those who are Orthodox Jews, faithfully observe Saturday as their Sabbath, which serves as a day of comfort and rest for them, and they representing the working class, as well as the Christians, because of the forty hour week law enjoy this Saturday and abstain from work the same day.

They are permitted under the present Lord's Day statute to purchase Kosher meats on Sunday. In all other respects the food they partake of outside of special holy days in the liturgy of Orthodoxy is the same as that used by Christians, but we cannot forget that if there is any interference with their religious observances these questions should be settled by the General Court of Massachusetts, which is in a position to recognize these minority rights which after [fol. 229] all are but a small percentage of the population. In this particular matter before the Court these petitioners have been engaged in business since 1934, and an examination of their charter rights clearly indicates that they have the power to open warehouses on Sunday. It is clear that the Jewish people who passed down through the corridors of centuries the precious spiritual values which have served as a foundation stone of respect for God would not for one minute support any movement where under the cloak of religion a one-man corporation was using a spiritual garment as a medium by which unjustly to enrich himself.

I would dismiss the complaint, or refuse the injunction, and declare the statute constitutional in the circumstances.

I am respectfully reserving the right to file an additional memorandum if I find it necessary to discuss other matters which are a part of the history of this case.

[fol. 230] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant.

FINAL DECREE—June 12, 1959

Whereas the above-entitled cause came on to be heard on the 13th day of November, 1958, and all parties thereto appeared by counsel;

And Whereas the Court heard the pleadings, the evidence, and arguments by counsel for the parties and the Commonwealth of Massachusetts, and briefs on behalf of amici curiae, and upon due consideration thereof held in an opinion, findings of fact and conclusions of law filed on the 20th day of May, 1959, that the plaintiffs should be granted relief;

And Whereas it was ordered that the form of decree be settled upon notice, and the plaintiffs having submitted and served a proposed form of decree, and no counter-form

of decree having been filed, and objections to the proposed form having been considered, it is therefore, on this 12th day of June, 1959,

Ordered, Adjudged and Decreed:

(1) That Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, is unconstitutional, void and unenforceable as applied to the plaintiffs in this [fol. 231] action, in so far as it requires the Crown Kosher Super Market to remain closed on Sunday after it has remained closed on the preceding Friday night and Saturday;

(2) That the defendant, his agents, servants, and employees, and all others acting in his behalf, be, and they hereby are, enjoined and restrained from taking any action whatsoever, by instituting prosecutions or otherwise, to enforce Section 5 of said Chapter 136 of the Massachusetts General Laws (Ter. Ed.), as amended, against the plaintiffs in this action; and

It is further Ordered, Adjudged and Decreed that the plaintiffs recover the costs of these proceedings, to be taxed by the Clerk of this Court.

Calvert Magruder, Peter Woodbury.

June 12, 1959

[fol. 232] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION FOR NEW TRIAL—Filed June 22, 1959

Now comes Edward J. McCormack, Jr., Attorney General for the Commonwealth of Massachusetts and moves that a new trial be granted in the above entitled matter for the following reasons:

1. The evidence submitted is insufficient as a matter of law to sustain findings of fact.

2. The findings of fact made by the Court are inconsistent with such evidence as was submitted.

3. The opinion of the majority of the Court is predicated on its finding that "most of the facts were stipulated by the parties" whereas the stipulation actually was limited to the tenets of the orthodox Jewish faith and did not relate to particular facts affecting the petitioners.

[fol. 233] 4. The opinion states that four officers and stockholders and six directors of the corporate plaintiffs are all adherents of the orthodox Jewish faith. No evidence was offered to support this conclusion.

5. The opinion states that a very substantial percentage of the corporate plaintiff's customers are orthodox Jews. No evidence was offered to substantiate this fact.

6. The opinion states that a large majority of Crown Market's customers may not shop on the Sabbath. No evidence was submitted to support this conclusion.

7. The opinion states that an inspector for the Rabbi comes to the Crown Market at 8:00 a.m., on Sundays for the washing of meat. The evidence clearly shows that the meat was not washed on Sunday.

8. The opinion states that the plaintiff Rabbi adequately represents a class of persons affected by the statute in question. No evidence was submitted to support this conclusion.

9. The opinion states that plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. This statement is not supported by the law of the Commonwealth of Massachusetts. Assuming it were correct, the plaintiffs would have no standing to object to the statute if they could not show that their rights were injured by it.

10. The majority opinion interpreted the Massachusetts Statute in a manner contrary to the interpretation placed upon it by State Courts and have thereby rendered an invalid judgment.

11. The majority opinion on its face states that G.L. c. 136, § 5 violates the Federal Constitution because it was a statute affecting the establishment of a religion whereas [fol. 234] the Decree entered by the Court is inconsistent therewith by providing that the statute is unconstitutional only as applied to the petitioners in this case.

12. The Decree entered by the Court in this case has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect.

13. Additional evidence is available as indicated by the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is estopped to obtain the relief requested in the present proceeding.

14. The Final Decree purports to restrain only a local police chief and does not extend to a State official. As such, the Decree is invalid because it has not been joined in by the one District Court Judge sitting in the case.

15. In addition to the foregoing, the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion.

Respectfully submitted,

Edward J. McCormack, Jr., Attorney General, By
Joseph H. Elcock, Jr., Assistant Attorney General.

Proof of Service (omitted in printing).

[fol. 235]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471 M

CROWN KOSHER SUPER MARKET OF MASS., INC., and IRVING HEAFITZ et al.

v.

GALLAGHER

OPINION OF THE COURT—July 20, 1959

On Petition for Rehearing

Per Curiam. We have before us a paper wherein the Attorney General for the Commonwealth of Massachusetts comes "and moves that a new trial be granted in the above entitled matter". This may seem somewhat curious because, although an appearance was filed on behalf of the Governor and the Attorney General, the Attorney General has not appeared for the sole defendant, nor does he purport to act for him. We must assume, however, that in effect the Commonwealth intervened as a party defendant pursuant to its undoubted right to do so under 28 U.S.C. § 2284(2), and that the failure to file a formal petition for intervention was just an administrative omission. Thus we take it in the present movant's favor that he has standing to seek a new trial.

Ground 1 of the motion for a new trial is that: "The evidence submitted is insufficient as a matter of law to sustain findings of fact." Ground 2 reads: "The findings of fact made by the Court are inconsistent with such evidence as was submitted." These grounds are of course important if true. But it must be remembered that in an equity case the court is the trier of the facts. It is the court which must weigh the testimony and other evidence, observe the demeanor of the witnesses, and find the facts. It is abundantly clear that there is evidence to support the findings

of fact, and the majority of the court are content to abide by those findings on the evidence submitted.

Ground No. 3 complains of the court's finding that most of the facts were stipulated by the parties, whereas the stipulation actually was limited to the tenets of the Orthodox Jewish faith and did not relate to particular facts affecting the petitioners. This asserted ground for a new trial is patently absurd, in the face of an examination of the stipulations of fact signed by the movant's attorney, especially the supplementary stipulation.

Ground No. 7, in which it is stated that the "evidence clearly shows that the meat was not washed on Sunday", is based upon a clear misstatement of the court's finding that "The inspector comes . . . on Sunday for the washing of *any* meat from animals slaughtered on the previous Thursday *which is on hand*." [Italics added.] In any event, this is a tempest in a teapot concerning a very minor matter.

[fol. 236] The findings attacked by grounds numbered 4, 5, 6 and 8 are supported by substantial credible testimony, by the stipulations of fact, and by the exhibits, just as is the finding that 95 per cent of Crown Market's stock is kosher.

Ground No. 9 objects to the statement in the court's opinion that the plaintiff customers and plaintiff rabbis cannot, by any act of shopping at the corporate plaintiff's store or by inspecting it, violate the Sunday law. It was stipulated that the plaintiff customers were Orthodox Jews; the rabbis, needless to say, are orthodox. These persons are squarely exempted from the Sunday law by c. 136, § 6, even as construed in *Commonwealth* v. *Starr*, 144 Mass. 359 (1887).

Ground No. 10 objects that the judgment is invalid because the majority opinion interpreted the Massachusetts Sunday law in a manner contrary to the interpretation placed upon it by the state courts. The court was bound to accept as its premise the interpretations put upon the Sunday law by the Supreme Judicial Court, and it did so. In fact, at the oral argument before us we understood

movant to contend that all the plaintiffs were within the exception contained in § 6; but the court was obliged to accept the contrary holding of the *Starr* case, supra. The majority did reject, which it had the right to do, the characterization of the statute in *Commonwealth* v. *Has*, 122 Mass. 40 (1877), as being merely a police measure designed to preserve a day of rest. We rejected that characterization as sporadic in the state decisions and unsound on the face of the statute. It is also to be noted that the Supreme Judicial Court has never had occasion to pass on the federal constitutional questions presented in this case.

Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to the petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to these complaining persons.

It seems hardly necessary to answer the objection contained in ground 12 of the motion that the decree entered by this court "has the effect of preferring members of the orthodox Jewish faith to members of any other religious sect." This objection ignores, among other things, the fact that the court held that these plaintiffs were unconstitutionally discriminated against. We can only knock out that which we find to be unconstitutionally discriminatory; we cannot go further and legislate a wholly even balance between the competing interests.

[fol. 237] Ground No. 14 objects that the decree purports "to restrain only a local police chief and does not extend to a State official", whereas under 28 U.S.C. § 2281 the power of a three-judge court is limited to restraining the action "of any officer of such State in the enforcement or execution of such statute". This objection is insubstantial in view of the answer and stipulation, both of which conceded that the defendant police chief did and would enforce the state law. *Browder* v. *Gayle*, 142 F. Supp. 707 (M.D.

Ala. 1956), aff'd 352 U.S. 903 (1956). Besides, this question is probably rendered moot by the Attorney General's intervention as a party defendant.

Grounds 13 and 15 may be discussed together. In ground 13 it is objected that "Additional evidence is available as indicated in the minority opinion to establish that the corporate plaintiff in the present proceeding was actually a party in State proceedings and therefore is estopped to obtain the relief requested in the present proceeding." More generally, in ground 15 "the Attorney General seeks a new trial for purposes of clarifying and elucidating further the conflicting factual situation described in the minority opinion."

The State's titling of an indictment brought against "Harold Chernock d/b/a Crown Market" cannot be laid at the door either of Chernock or of the corporation. Further, the plaintiff Crown Market is certainly a corporation, whereas, as the answer admits, the state prosecution and conviction were solely of the individual Chernock. See also *Browder* v. *Gayle*, supra. The auxiliary civil action in the state courts never reached the merits before its dismissal as moot. Moreover, grounds 13 and 15 are both insufficient in failing to indicate what clarifying evidence could be introduced at a new trial, unless the only evidence is that described in the dissenting opinion. Assuming that it is so, the movant has wholly failed to demonstrate either that the failure to introduce such evidence was excusable or, more important, that any new evidence is available which would affect the result.

It may be that the case might have been presented to us differently if another had been in charge of defending it. But we must act on the evidence presented to us in an adversary proceeding, not on matters dehors the record found in an ex parte investigation. *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F. 2d 316 (C.A. 3d, 1944), cert. denied 325 U.S. 867 (1945).

McCarthy, J., dissents from the denial of the motion for a new trial, and reserves the right to file a memorandum at a later date.

An order will be entered denying the motion for a new trial.

[fol. 238]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Title omitted]

ORDER DENYING MOTION FOR NEW TRIAL—July 20, 1959

Upon consideration of the motion for new trial filed by the Attorney General of the Commonwealth of Massachusetts on June 22, 1959, plaintiffs' memorandum in opposition thereto, and the Attorney General's memorandum in support thereof, and in accordance with the opinion filed this day,

It is hereby ordered, adjudged and decreed that the motion be, and the same hereby is, denied.

By the Court:

Calvert Magruder, U.S.C.J. (Ret.)

John A. Canavan, Clerk, By Joseph [Illegible], Deputy Clerk.

[fol. 239]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC., et al.,
Corporate Plaintiff,

vs.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts.

MEMORANDUM ON ORDER DENYING MOTION FOR NEW TRIAL—July 23, 1959

McCarthy, D. J.

On July 20, 1959, an order was entered by Judge Magruder, concurred in by Judge Woodbury, denying the motion filed by the Attorney General of the Commonwealth of Massachusetts that a new trial be granted in the above-entitled matter. It is my considered judgment that the Attorney General of the Commonwealth of Massachusetts should have been accorded the opportunity to appear and argue orally the motion for a re-hearing filed by him in a case which indisputably contained so many complexing facts and circumstances. This procedure in the District Courts of the United States has always been recognized.

I disagree with the judicial determination of my distinguished colleagues both as to procedure and as to substance and I will file at a later date my memorandum fully expressing the reasons for my dissent.

[fol. 240]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC.,

v.

RAYMOND P. GALLAGHER, Chief of Police.

DISSENTING MEMORANDUM ON ORDER DENYING MOTION FOR NEW TRIAL—November 12, 1959

McCarthy, D. J.

In this Three-Judge Court case the Commonwealth of Massachusetts moved for re-hearing after the decision of the majority of the court had been handed down. The same majority in a "per curiam" decision have denied the motion without a hearing. As I indicated when the motion was

denied, I did not agree with the denial. Herein, I express my reasons briefly for that disagreement.

In my dissenting opinion I stated that "the interests of justice would best be served by reopening the case in this court for the purpose of taking testimony for the purpose of establishing the truth". A re-examination and re-appraisal of the case as it was presented to the court has served only to strengthen my conviction that this case should not go to the Supreme Court in its resent posture. The basic issues involved are of such importance that it would be extremely unfortunate, to say the least, to have the High Court presented with a record that is incomplete, inconclusive and confusing. A rehearing in my judgment would have resulted in the introduction of sufficient evidence to have clarified the factual situation.

In the memorandum of the majority of the court filed after the motion for rehearing was denied, it is stated [fol. 241] that "the result in this case might well have been different had the case been tried in another way". I would be less than candid if I did not make the observation that insofar as the presentation of evidence on behalf of the defendant was concerned, the case was not tried at all. One need only consult the record in the case and the docket entries on file to appreciate that this is so. The late Attorney General of the Commonwealth apparently contented himself with filing an appearance in its behalf. An Assistant Attorney General was assigned to the case but his activity was confined to the arguing of a motion to dismiss the complaint and to a cross-examination of the one witness who testified on behalf of the corporate plaintiff. In making that observation I make no reflection upon the able Assistant Attorney General who appeared in the court proceedings. Whatever the reasons may have been for the failure of the Commonwealth to investigate the allegations of the complaint, to present evidence on behalf of the defendant, and to uphold the constitutionality of the law of Massachusetts which had been repeatedly upheld by the State Supreme Court, the fact remains that the complete absence of credible evidence has left the record in this case inconclusive and confusing. I may say that the lack of preparation in this case was known to the majority of the court before the first hearing and, *a fortiori*, at the time that the motion

for re-hearing was decided adversely. Believing as I do that the sole aim and object of the trial of a law suit is to establish the truth, I deem it my duty to renew the protest hitherto made in my dissenting opinion against the manner in which this cause has been defended.

The basic issues involved are of such importance that it would be extremely unfortunate, to say the least, to have the Supreme Court presented with a record that is thoroughly incomplete, inconclusive, confusing, and lacking in probative value, exemplified by the many contradictory [fol. 242] statements by the one witness, Mr. Chernock. He was the chairman of the board of directors and owned fifty per cent of the stock of the company, of which his wife and a relative were also members and constituted three of the five directors. He was the general manager but could give no testimony with reference to the sale of the commodities outside of meat. Non-meat products represented at least eighty-five per cent of the many commodities which were not established as kosher food products. These other products were purchased by somebody else and Chernock admitted that he could not tell what they were—all this in a store called a kosher super market which employed as a maximum no more than eleven, and with a general average of six working. It is important to contrast the testimony with the agreed statement of facts which are already in evidence and upon which the same case under another name was passed upon favorably to the Commonwealth in the criminal proceedings by the Supreme Judicial Court.

I believe that a court should be extremely reluctant to strike down a state statute as unconstitutional where the state courts have upheld the statute on repeated occasions, especially where a court is presented with a record such as we are confronted with here. I would allow the motion for rehearing and grant the parties sufficient time to develop the evidence required to sustain or refute the allegations of the complaint.

I would respectfully suggest in the alternative that the proceedings be referred to a special master in order to have the true facts determined. Apart completely from the relative values of the various factual questions arising out of the testimony of the witness Chernock, which is a part

of the transcript of the hearing before the three-judge court on November 13, 1958, which transcript also contains arguments of counsel in connection with other matters which were argued before the court at that time, and which is a part of the court record to be sent to the Supreme Court of the United States on the appeal that has been taken, I [fol. 243] reaffirm my conclusions of law on every phase of the other issues before the three-judge court which I have set forth in my original dissenting opinion.

[fol. 244] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 58-471-M

CROWN KOSHER SUPER MARKET OF MASS., INC.,
Corporate Plaintiff,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated and RABBI MOSES D. SHEINKOPF, Chief Orthodox Rabbi of the United Orthodox Congregations of Springfield and President of the Massachusetts Council of Rabbis, suing on behalf of himself and other Rabbis similarly situated, Individual Plaintiffs,

v.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, Defendant

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 18, 1959

Notice is hereby given that Raymond P. Gallagher, Chief of Police of the City of Springfield, Massachusetts, the defendant above named, together with Edward J. Mc

Cormack, Jr., as he is Attorney General of the Commonwealth of Massachusetts, and Foster Furcolo, as he is Governor of the Commonwealth of Massachusetts, are both entitled to notice as provided in 28 U.S.C. Sec. 2284 (2) hereby appeal to the Supreme Court of the United States from the Final Decree declaring Chapter 136 of the Massachusetts General Laws (Ter. Ed.) as amended, unconstitutional, void and unenforceable as applied to the plaintiffs, and enjoining and restraining the defendant Raymond P. Gallagher from enforcing Section 5 of said Chapter 136 as against the plaintiffs, said decree having been entered on June 12, 1959. The said defendants further appeal from the Denial of the Defendant's Motion to Dis- [fol. 245] miss, also entered on June 12, 1959, and from the Denial of the Defendant's Motion for a New Trial, entered on July 20, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1253.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Summons
Complaint
Plaintiffs' Motion for Preliminary Injunction
Plaintiffs' Motion to Amend Complaint
Defendant's Motion to Dismiss Complaint
Defendant's Answer
Denial of Defendant's Motion to Dismiss
Stipulation as to Facts
Supplemental Stipulation as to Facts
Stenographic Record
Opinion of the Court
Dissenting Opinion
Final Decree
Defendant's Motion for New Trial
Opinion of Court Denying Defendant's Motion for New Trial

Denial of Defendant's Motion for New Trial
Memorandum Dissenting to Denial of Defendant's Motion for New Trial

The following questions are presented by this appeal:

1. Does a Three Judge Court have jurisdiction to enjoin a municipal police official from enforcing a statute on the ground that such statute is unconstitutional?

[fol. 246] 2. Are the plaintiffs proper parties to raise the issues before the Court?

3. Should the Court have exercised its equitable jurisdiction?

4. Do the provisions of the Massachusetts General Laws, Chapter 136 violate the rights, privileges or immunities of the plaintiffs under the Constitution of the United States in interfering with their freedom of religion, by depriving them of their liberty or property without due process of law or by denying them the equal protection of the laws?

5. Has the Three Judge Court correctly applied the Massachusetts statute as interpreted by the Supreme Judicial Court of the Commonwealth?

6. Is the evidence submitted to the Court sufficient as a matter of law to sustain the findings and decree?

7. Is the decree entered by the Court consistent with the findings of fact?

By their Attorneys

Edward J. McCormack, Jr., Attorney General for the Commonwealth of Massachusetts;

Joseph H. Elcock, Jr., Assistant Attorney General for the Commonwealth of Massachusetts;

John Warren McGarry, Assistant Attorney General for the Commonwealth of Massachusetts and member of the bar of the Supreme Court of the United States;

S. Thomas Martinelli, City Solicitor, Springfield, Massachusetts.

[fol. 247] Proof of Service (omitted in printing).

[fol. 247a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 248]

SUPREME COURT OF THE UNITED STATES

No. 532, October Term, 1959

GALLAGHER, Chief of Police of the City of Springfield, Massachusetts et al., Appellants,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., et al.

Appeal from the United States District Court for the District of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—April 25, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 25, 1960.